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THE
ALBERTA
LAW QUARTERLY

VOLUME IV.
1940-1942

PUBLISHED QUARTERLY BY
THE STUDENTS OF THE FACULTY OF LAW
AT THE UNIVERSITY OF ALBERTA

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EARL CAIRNS, 1819-1885

Hugh McCalmont Cairns was born at Cultra, County Down, Ireland, on the 27th of December, 1819, of parents of Scottish origin. He received his education at Belfast Academy and at Trinity College, Dublin, graduating in classics in 1838. In 1844 he was called to the bar at the Middle Temple, to which he had migrated from Lincoln's Inn. He commenced his practice at the Chancery Bar, where, at the outset, it appeared that he was doomed, by virtue of his characteristically slow and diffident manner of speech, to ignominous failure. Indefatigable as Demosthenes, he assiduously disciplined himself to eradicate the fault, with the result that at a relatively early date he overcame what might have proved to be a formidable handicap to a legal career.

His rise to fill offices of dignity and responsibility was meteoric. In 1852 he was initiated into political life when he was returned to the House of Commons as member for Belfast. His appointment to the position of Solicitor-General came at the time of his attaining knighthood in 1858. In 1866 he was appointed Attorney-General, and in the same year became a Lord Justice of Appeal. When the Conservatives came to power in 1868, Disraeli had Lord Cairns promoted to the highest judicial office in the realm, that of Lord Chancellor, superseding Lord Chelmsford who bitterly complained that he had been dismissed with less ceremony and courtesy than if he had been a butler. However, his incumbency of the Chancellorship was only transitory, for Disraeli's administration lasted only a few months, and Lord Cairns became, in the following year, 1869, on the death of Lord Derby, the leader of the Conservative opposition in the House of Lords. He had distinguished himself in the Commons by his resistance to the Roman Catholic's Oath Bill brought in in 1865, and now, in the Lords, his efforts on behalf of the Irish Church were equally strenuous.

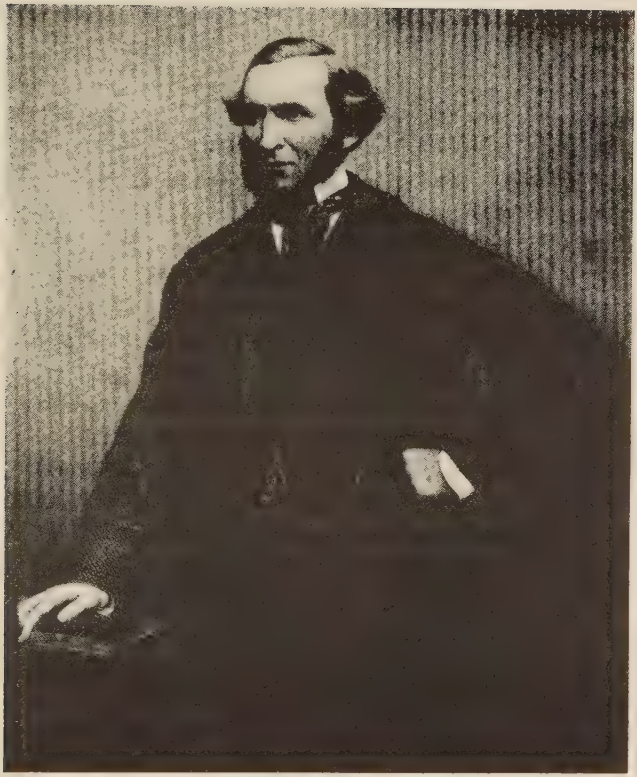
On the Conservatives' coming to office in 1878, he again became Lord Chancellor; in 1878 he was made Viscount Garmoyle and Earl Cairns; however, in 1880, his party went out of office and in opposition he is found exercising a mere vestige of his wonted vigor; yet when Lord Beaconsfield died in 1881, there were many Conservatives who considered that Earl Cairns' title to lead the party was better than that of Lord

Salisbury. During the later years of his life he was forced into periodical retirements due to failing health, which culminated in his death in 1885.

Of his legal attainments, there can be no doubt. His influence upon the legislation of the day was largely felt where questions affecting religion and the church were involved and in matters peculiarly affecting his own profession. He had headed, as chairman, a committee on judicature reform, just prior to the passing of the Judicature Act. He took part, when out of office, in the passing of the Married Women's Property Act, and was directly responsible for the Conveyancing Acts of 1881-1882, and for the Settled Land Act.

Earl Cairns was by nature severe, with a Scottish, not an Irish cast of countenance. His chilly manner, coupled with his somewhat austere religious principles, had no doubt much to do with the fact that he was never a popular man. He did posses a keen sense of humor, but such was discriminately revealed only to his personal friends, and never to his professional associates. It is manifest that he thought the exhibition of humor incompatible with the dignity of high judicial office; and his stiff, formal deportment may be attributed to his scrupulous adherence to such a conviction. His style of delivery was, as a rule, cold to a marked degree. The term "frozen oratory" has been applied as descriptive of his speeches, and it has been said of them that they flowed "like water from a glacier", and again, "the several stages of his speech are like steps cut out in ice, as sharply defined, as smooth and as cold." His judgment took the form of luminous expositions or treatises upon the law governing the case before him, rather than of controversial discussions of the arguments adduced by counsel or of an analysis of his own reasons.

ALEX SMITH.



Earl Cairns

LIABILITY INCIDENT TO THE OWNERSHIP OF A MOTOR CAR

I.

This discussion is in some respects academic, in that consideration will be given to some legal precepts both legislative and judicial which have ceased to be law. This, however, is done in the belief that an exposition of the changing rules in this field is essential to the understanding of the law as it is today. To put this thought more concretely, a lack of appreciation of the statutory background in Ontario and the difference between that background and the local one frequently has led courts in other provinces into the incongruous practice of applying a case decided on a repealed section of the Ontario Act to reach a decision on its own legislation which never was substantially similar to the Ontario legislation as it existed at the time of the Ontario decision.

Prefaced by these generalizations, what follows is an historical and comparative survey of the process by which the various provinces have reached their present positions with respect to the liability imposed upon the owner of a motor car as owner, when that motor car is in the possession or control of some person other than the owner, in the Acts usually denominated a Driver.

Apart from statute it is clear that the owner of a motor car would be under no liability whatever, either civil or penal, *qua* owner, but would however incur vicarious civil liability for the negligent acts of his servant while the latter was acting within the course of his employment. Possibly the "Family Car Doctrine" as developed in some of the American state courts might be here mentioned. Under it when a person (usually the father of a family) purchased an automobile which he permitted other members of the household to drive, it was said that he had purchased the car for the comfort, convenience, and pleasure of the family; that it was the father's business to supply comfort, pleasure and convenience to his family; and that therefore a young male member of the family was acting as agent or servant of the head of the family in giving himself pleasure when he was taking his latest girl friend for a drive. The whole doctrine is palpably fictitious, and the courts employing it merely put into the agency hat those rabbits which they later, with a flourish of logical deduction, drew out (1).

(1) That in itself is, I suppose, too common to be a ground for condemnation. This instance is merely remarkably flagrant.

Nevertheless, in essence the underlying principle imposing liability upon a relatively solvent person who has been instrumental in placing a relatively insolvent person in a position where statistically speaking that person is bound to cause considerable damage, is identical with the principle underlying respondeat superior. There is however one notable difference, in that usually where an actual master and servant relationship exists, the individual representative of the class of persons upon whom rests the immediate incidence of the risk is enabled to shift it to consumers of his goods or services. The motor car owner as such is unable to make the corresponding redistribution. Since the trend is toward liability insurance, the costs incident to this risk tend to become a cost of motor car operation. At some point this otherwise heavily taxed activity will not produce the optimum number of golden eggs. It does not appear that there has been a great deal of consideration as to where that point lies.

The owner would also be civilly liable if he permitted some person to drive whom he knew or ought to have known was incompetent, and probably the owner would be civilly liable if he permitted a driver to drive a motor car which the owner knew or ought to have known was dangerously defective. By "ought" I mean that a jury would under proper instructions find that an ordinary prudent man would have known. Within the boundaries of that broad standard the duty is clear without going the full length to which the Master of the Rolls was willing to go in *Heaven v. Pender* (2), although the House of Lords in the case of *McAlister v. Stevenson* (3) paid tribute to the profound sagacity of that learned gentleman's statement of the principle upon which the common law predicates a duty to exercise care for the safety of others.

II.

Such is the common law background. Upon it the legislatures have written an heterogeneity of rules. It is the purpose of this paper to trace the legislation and its judicial construction, not from its beginning, but

(2) 11 Q.B.D. 503 (1883 C.A.), see Brett, M.R. at 509.
"The proposition which these recognised cases suggest, and which is, therefore, to be deducted from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

(3) 1932 A.C. 562 (see Lord Atkin at 580).

from far enough back to present an understandable picture of where we are today.

The legislation on this problem began with a highly ambiguous provision of which the following is typical:

> "The owner of a Motor Vehicle for which a permit has been issued under this Act shall be held responsible for any violation of the Act or of any regulation provided by order of the Lieutenant-Governor in Council" (4).

Early in its career in Ontario this section received a construction which may account for a good part of the subsequent uncertainty and confusion. In 1908 the Ontario courts in *Smith v. Brenner* (5) and *Mattei v. Gillies* (6) dealt with cases in which the defendant's servant driving the defendant's motor in the course of his employment negligently caused a plaintiff injury. Both courts held the master liable on common law principles. In each case there had been argument as to whether the servant had been acting in the course of his employment, and each court, after disposing of this point in favor of the plaintiff, continued and gave as an alternative reason the above set out provision of the Highway Traffic Act. In both cases the court was more concerned with finding something with which it could buttress its already formed conclusion than with making a serious attempt to determine what the Ontario legislature had enacted.

On the facts of these cases no untoward result was reached. Indeed, the tendency toward widening the concept of "course of employment" combined with the nascent and nebulous "family car doctrine" which in one form or another was taking hold of the public imagination, would lead to an acceptance of the results of these cases without careful scrutiny of the process by which the decisions were arrived at. And no one of the judges seems to have realized that these judicial pronouncements involved a great deal more than either of these principles carried to their extreme limit. Nevertheless they did, and the added something was the imposition of civil liability for the consequences of any violation of the absolute provisions of the Highway Traffic Act. In fact this startling implication did not reveal itself until the case of *Hall v. Guelph Express* (7). This case (to be discussed later), which grimly carried the

(4) Statutes of Ontario 1908, C. 46.
(5) 12 O.W.R. 9 (Ont. Trial 1908).
(6) 11 O.W.R. 1083; 16 O.L.R. 558; (Ont. Div.) 1908.
(7) 1929 S.C.R. 92; 1929 1 D.L.R. 375; 63 O.L.R. 355.

above construction to its logical conclusion, effectively demolished it by causing the Ontario Legislature to repeal its current version of the above set out provision (then embodied in R.S.O. 1927 Ch. 25 s. 41) and to substitute therefor the following:

> "The owner of a motor vehicle shall incur the penalties for any violation of this Act . . . and the driver of a motor vehicle not being the owner shall incur the penalties provided for such violation" (8).

In the meantime the Ontario Legislature had added some clauses and subsections to its original Act until in 1927 the relevant portion of the Ontario Act appeared in the following form:

(1) "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also be liable for any violation."

(2) "If the employer of a chauffeur is present in the motor vehicle at the time of the committing of any offence against this Act, such employer as well as the driver shall be liable to conviction for such offence." 1923 Ch. 48, s. 42.

(3) "This section shall not apply to any action brought by a passenger in a motor vehicle against the owner or driver of the vehicle in respect of any injuries sustained by him while a passenger." 1926 Ch. 38, s. 10 (part) (9).

With the Act in this stage, *Rex v. Doyle* (10) and *Rex v. Toronto Transportation Commission* (11) came up. Both cases raised the question of penal responsibility under section 41 (1). Reasoning from the postulate that 41 (2) was superfluous and incongruous if 41 (1) carried penal responsibility, the court in each case came to the conclusion that the

(8) Statutes of Ontario 1929, Ch. 68 s. 9.

(9) This subsection (3) must not be mistaken for the modern section taking away the right of action of a gratuitous passenger; it simply left all passengers dehors the act. The above set out section (3) included in its original form a clause providing for the non-application of the well-known "onus of proof" section of the Act to actions by passengers; in the revision of 1927 that clause of the Amending Act of 1926 was carried into a subsection of the onus section of the Ontario Act.

(10) 50 Can. C.C. 233 (Ont. Dist. (1928)).

(11) 52 Can. C.C. 413 (Ont. Co. Ct. 1929).

responsibility created by 41 (1) was civil and civil only, and quashed convictions against owners who had been convicted for vicarious infractions of the Act. A similar view had been expressed in *Verral v. Dominion Automobile Co.* (12).

This is not the end of the story for Ontario, but it will make for greater clarity if we leave Ontario and bring each province to approximately the date of the Doyle case. It will then be possible to state briefly the existing law in the various provinces. With the exception that Alberta will be considered before British Columbia, the provinces will be dealt with in their regular order from West to East. Alberta is discussed first because there the resemblance and contrasts are in such challenging opposition to Ontario.

In Alberta the Motor Vehicles Act, Statutes of Alberta 1911-12, Ch. 6, s. 35, read as follows:

> "The owner of a motor vehicle for which a certificate of registration has been issued under this Act shall be liable for violation of any of the provisions thereof in connection with the operation of such motor vehicle."

In *B. & R. Company v. McLeod* (13) Mr. Justice Stuart refused to construe this statute as imposing civil liability on the owner at all, despite the fact that the Alberta Legislature had practically copied the Ontario Act already construed by the Ontario courts.

Early in 1914 in *Witson v. Arnold & Anderson* (14) Mr. Justice Scott refused to follow his brother Stuart's decision, and in an equally careful judgment applied the presumption that the local legislature had incorporated the settled construction already placed on these words by the Ontario courts. The McLeod case was reversed by the Alberta Court of Appeal (15) chiefly on the ground taken by Mr. Justice Stuart in the Anderson case. This presumption is well sustained by authority and as a practical matter is sensible enough.

But the Alberta Legislature in 1917 by Ch. 3, s. 21 of the Acts of that year added the following to the original s. 35:

> "Unless such owner shall prove to the satisfaction of the Justice of the Peace or Police Magistrate trying the case that at the time of the

(12) (1911) 24 O.L.R. 551 (Ont. Div. 1911).
(13) 7 D.L.R. 579 (Alta. Trial 1912).
(14) 15 D.L.R. 915 (Alta. Trial 1914).
(15) 18 D.L.R. 245 (Alta. App. Div. 1914).

offence such motor vehicle was not being driven by him, nor by any other person, with his consent, express or implied."

"Provided that if the owner was not at the time of the offence driving the motor vehicle he shall not be liable to imprisonment."

In *Johnson v. Mosher* (16) the Court of Appeal of Alberta felt that these two clauses so obviously and exclusively referred to penal proceedings that the legislative intent that the original s. 35 should impose penal liability only was so clearly established that the McLeod case could no longer be regarded as a correct construction of s. 35. This is an extremely deep inference of an indirect legislative intent and it is safe to assume that in 1917 the Alberta Legislature had no conscious intention of killing the McLeod case.

After *Johnson v. Mosher* (16) quiet reigned in Alberta. With the result in striking contrast to that in Ontario, i.e., in Ontario the section imposing liability on an owner *qua* owner created civil but not penal liability, whereas in Alberta a similar section created penal but not civil liability. Alberta remained in this position until 1933.

British Columbia

We may begin in British Columbia with R.S.B.C. 1911, Ch. 169, s. 33, which was in the following terms:

"The owner of a motor vehicle for which a license has been issued under this Act, shall be held responsible for any violation of this Act, or of any regulations provided by Order of the Lieutenant-Governor in Council by any person entrusted with possession of such motor."

The British Columbia Court of Appeal in *Boyer v. Moillet* (17) decided that this section imposed penal responsibility only. This view has been adhered to by the Courts in British Columbia (18). See *Perrin v. Vancouver Drive Yourself Auto Livery* (19), *Ruff v. Sutherland Motors* (20).

Saskatchewan

The Saskatchewan cases are in accord with the Alberta and British Columbia cases. From *Haggerty v. McKay* (a memorandum report) as

(16) 50 D.L.R. 321 (Alta. App. Div. 1915).
(17) 61 D.L.R. 136 (B.C.C.A. 1921).
(18) 61 D.L.R. 140 (B.C.C.A. 1921).
(19) 1931 1 D.L.R. 651 (B.C.C.A.),
(20) But see Beazley v. Mills Bros. 1937 1 D.L.R. 205 at 209 (B.C.C.A. 1936). The British Columbia legislation creating liability did not come until 1937.

it appears in 1923 4 D.L.R., no light can be obtained. But the case is reported in full in 17 Sask. L.R., pages 517-27, where after careful consideration the court reaches the conclusion that the liability imposed is penal only (21).

Manitoba

TThe Manitoba Motor Vehicle Act as it appears in R.S.M. 1913, Ch. 131, contains no section imposing either civil or penal responsibility on an owner although it does contain the usual onus section (s. 63). However in 1915 (by Statutes of Manitoba 1915, Ch. 41, s. 14) a section imposing civil liability only was enacted as follows:

> "63*a*. In all cases when any loss, damage or injury is caused to any person by a motor vehicle, the person driving it at the time shall be liable for such loss, damage or injury if it was caused by his negligence or wilful act and the owner thereof shall also be liable to the same extent as the driver unless at the time of the injury the motor vehicle had been stolen or otherwise wrongfully taken out of his possession or out of the possession of any person entrusted by him with the care thereof."

Under it *Bobby v. Chodicker* come up (22). The defendant's son was driving his father's car without his father's permission, and there was no master and servant relationship between father and son. The defendant was held liable for an injury caused by the son's negligent driving.

The court appears to have extended the statute to reach this result. Dennistoun J.A. seems to be of the opinion that regardless of the facts the father must have consented. At any rate it was not "wrongfully taken out of his possession." Prendergast J.A. takes the view that "wrongfully taken" means legally wrongful—implying civil redress or punishment. And he is unable to find that it is legally wrongful for a boy to take his father's car if the keys are left accessible. Even if the father had expressly forbidden the boy to touch the car, Mr. Justice Trueman states that "wrongfully taken out of his possession" cannot apply to unauthorized user by a member of the owner's household.

Quebec

Ontario was dealt with early in this paper. We will now make an examination of the law of Quebec on the subject.

(21) See Accord Shorrt v. Wong 1929 4 D.L.R. 677 (Sask. K.B. 1929), Krahn v. Bell 1930 4 D.L.R. 480 (Sask. C.A. 1930).
(22) 1929 2 D.L.R. 590 (Man. C.A. 1929).

In R.S.Q. 1909, Section XXI (Motor Vehicles), Article 1406, we have definite and extreme provision for both penal and civil responsibility on the owner, no matter by whom the car is being driven. The Article read:

1406. "The owner of a motor vehicle for which a certificate is issued under this section, shall be held responsible for any violation thereof or of any regulations provided thereunder by order of the Lieutenant Governor in Council, and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square." 6 Ed. VII, Ch. 13 s. 18a, 7 Ed. VII, Ch. 16 s. 2.

Thereafter in 1912 by Statutes of Quebec 1912 (3 Geo. V), Ch. 19 s. 3, Article 1406 was repealed and a new 1406 substituted therefor, reading as follows:

(1) "The owner of a motor vehicle shall be held responsible for any violation of this section or of any regulation made thereunder by order of the Lieutenant Governor in Council."

(2) Ordinary onus of proof section.

(3) The section which induced the court in the *Verral, Doyle,* and *Toronto Transportation* cases, supra, to decide that the liability imposed by the Ontario subsection (1) was civil only.

Then in a consolidating Act in 1924 (Statutes of Quebec 1924, Ch. 24, s. 53) the Legislature amplified subsection (3) to read as follows:

(3) "If the employer of a person, driving a motor vehicle for hire, pay or gain is present in the motor vehicle at the time of the commission of any offence against this Act or any regulations made thereunder, such employer, as well as the operator or chauffeur, shall be liable to conviction for such offence, and it shall be in the discretion of the court to impose the penalty either upon the one or the other or upon both, according to the circumstances of the case; but if the vehicle is being driven by the chauffeur, and not by the owner, at the time of the offence, then—whether the owner be present in the vehicle or not at the time,—both the chauffeur and the owner shall be personally liable to conviction for the offence, and it shall be in the discretion of the court to impose the penalty either upon the one or the other or upon both, according to the circumstances of the case." 14 Geo. V, Ch. 24 s. 53.

In this form the legislation was carried into the revision of 1925, as s. 53 of the Motor Vehicles Act R.S.Q. 1925, Ch. 35.

What did the Quebec Legislature intend by its revamping of 1406 in 1912? It dropped the provisions making clear the civil liability of the owner. Standing alone that would seem to indicate an intent that the section should no longer impose civil liability. (Although Mr. Justice Anglin in *O'Connor v. Wray* (23) seems to think that "shall be responsible" clearly embraces civil liability.) But it does not stand alone, and subsection (3) provides an opportunity for Doyle case reasoning, which would lead the court to the conclusion that the section imposes civil liability only.

In the fascinating case of *O'Connor v. Wray*, in the Supreme Court of Canada, which confirms and supersedes several cases in the Quebec courts, the court, four to one (Anglin J., dissenting) decided that the Quebec legislation as of 1912 and 1924 which was the legislation to be construed in 1930 imposed penal responsibility only.

The facts in this case were: the defendant resident in Quebec owned a motor car. He loaned it to a friend who to his knowledge and with his consent was going to and did drive it into and in Ontario. There the driver negligently killed one person and seriously injured another.

Action was brought in Quebec, and on appeal to the Supreme Court of Canada, that tribunal affirmed the judgment of the Quebec Court of King's Bench in favor of the defendant. The majority took the view that had the damage been done in the province of Quebec the owner would not be liable because Section 53 of the Quebec Motor Vehicles Act did not impose vicarious civil liability on an owner *qua* owner. Therefore because in the view of the majority it was essential that the *lex fori* must grant a civil action on a like basis of liability in order that a tort committed abroad could be suable in the courts of the forum, it was held that the action would not lie. The majority reserved final opinion but inclined to the view that the action could not have been maintainable had the defendant been properly brought before the Ontario courts, because it had difficulty in seeing how the defendant had submitted to the Ontario legislation (24).

(23) 1930 S.C.R. 231 at 238-9.

(24) But cf Young v. Masci 289 U.S. 253 (1933), and see J. H. Beale Two cases in Jurisdiction (1935) 48 Harv. L. Rev. 620, 625-626; J. H. Beale Social Justice and Business Costs (1936) 49 Harv. L. Rev. 573, 606-609. This extremely difficult problem will have to be faced some time in the future. The chief hurdle from the American point of view seems to be the Fourteenth Amendment and the Supreme Court has gone on over it. From the Canadian point of view the difficulty lies in the restrictive nature of the

A piece of highly significant Quebec legislation seems to have escaped notice in *O'Connor v. Wray*. This was an amendment to section 11 of the Quebec Motor Vehicles Act by Section 3 of Ch. 19 of the Statutes of Quebec 1926.

Section 11 imposes on owners who have ceased to be owners a liability peculiar in Canada, and makes a registered owner who sells his car and fails to notify the registration bureau of the fact of such transfer jointly and severally liable with the transferee for all damages occasioned by the transferee up to the time such notice is given.

Mr. Justice Anglin in his dissent refers to Section 11 as an analogy from which he infers that a Legislature capable of Section 11 would not be shocked by and might well intend to impose vicarious liability for damages on the owner of a motor car when it was being driven by someone other than the owner or his servant, but makes no reference to the 1926 Amendment which is in the following words:

> (2) "Until the notice of such transfer has been given, signed and deposited in the manner indicated in subsection 1 of this section, the person who made the transfer shall be jointly and severally liable with the person in whose favor the transfer is made *for any loss or damage occasioned by the latter within the limits indicated in Section 53 of this Act.*" (Italics mine.)

As already stated Section 53 is the section which remained identical from 1924 through to *O'Connor v. Wray* (supra) and beyond. And the inference that whatever it was thinking of in 1912, the Quebec Legislature in 1926 thought that by Section 53 it had imposed civil liability is irresistible.

grant of provincial legislative powers under 92-13 "property and civil rights *within* the province".

Suppose identical legislation in two provinces imposes civil liability on the owner for injuries consequential upon the bailee's negligent driving. The bailee borrows the car in province A and negligently damages X in province B. Which provincial act creates the basis of liability? Can either or the combination of both acts impose liability on the owner? The Acts upon which liability is predicated took place partly within the ambit of one legislative fiat and partly within the ambit of another, and each may be unable to affect property and civil rights beyond its provincial boundary. If we treated legislative precepts on the same footing that common law principles are treated this particular difficulty would disappear. But we do not and the restrictive words of 92-13 present a real difficulty.

New Brunswick

Turning very briefly to the history of the matter in New Brunswick, the first imposition of any liability on an owner as owner appears to have been in 1925 when by Section 3 of Ch. 10 of the Statutes of New Brunswick, 1925, the following provision was enacted to become subsection 6 of Section 4:

> "The owner of a motor vehicle shall be responsible civilly as well as hereunder for any violation of any provision of this Act or of any regulation made under this Act, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner, without his consent, expressed or implied, and the driver of a motor vehicle not being the owner, shall also be responsible for any such violation, provided that no such owner shall be liable to imprisonment in respect of any such violation."

Civilly responsible for a violation of an act was probably intended to mean civilly responsible for damages arising out of a violation (whether negligent or not?). The section, while not a model of lucidity, is infinitely clearer than similar sections in many of the other provinces at this date.

Nova Scotia

In 1918 Ch. 12 s. 38 Nova Scotia passed a section which neatly covered the situation so far as penal liability is concerned:

> 38. "Where a motor vehicle is in the possession of any person other than the owner thereof with the owner's consent express or implied and such person violates any of the provisions of this chapter whilst the motor vehicle is on any public highway, the owner shall on request of the Secretary or of a peace officer furnish within 24 hours the name and address of such person, and on refusal, failure, neglect or inability to do so, the owner as well as such person shall be guilty of the offence."

This was carried as Section 38 into the revision of 1925.

> 39. "If the owner of a motor vehicle is present therein at the time the violation of any of the provisions of this Chapter by any other person operating the motor vehicle, the owner as well as such other person shall be guilty of the offence." 1913 Ch. 12 s. 39.

In 1928 Section 38 and Section 39 became Section 69 and Section 70, and Section 38 (69) changes slightly in that instead of "violate" it reads "and such person is alleged to have violated." Section 70 is Section 39 un-

changed. I can see no valid reason why this legislation is not all that is needed to cover the penal aspect of the problem.

At the same time, that is in 1918, by Ch. 12 s. 50 of the Statutes of Nova Scotia for that year, the Nova Scotia Legislature enacted the following:

> 1. Where any injury loss or damage is incurred or sustained by any person by reason of the presence of a motor vehicle upon a highway, the person sustaining such injury, loss or damage shall be entitled to recover the amount thereof in any court of competent jurisdiction from either:
>
> (a) the owner, unless he shall establish that such injury, loss or damage was not caused by any negligence or wrongful act of his or of any person operating such motor vehicle in the course of his employment as a servant or agent of such owner, or
>
> (b) the operator of such motor vehicle, unless such operator shall establish that such injury, loss or damage was not caused by any negligence or wrongful act of his."

It should be noted that Nova Scotia is then the third province (25) in which the Legislature clearly and intentionally dealt with the problem of civil liability of an owner *qua* owner. It is interesting to note also that Nova Scotia combines in this above-set-out section, its onus section with the provisions dealing with civil liability of the owner, and that instead of making him liable it merely imposes upon the owner the burden of establishing that the driver was not driving as his servant in the course of his employment.

Prince Edward Island

Although Prince Edward Island had the standard onus section, in what appears to have been its first motor vehicle act (26) it seems to have enacted no legislation dealing with the present problem until 1922, when by Sections 77 and 78 of Ch. 1 of the statutes for that year it enacted provisions identical with Sections 38 and 39 of Ch. 12 of the Nova Scotia statutes of 1918. By the statutes of Prince Edward Island 1926, s. 5 Ch. 8, the following section which became Section 60, subsection 2, was enacted in the following terms:

(25) See Quebec (supra) 1909 but consider the subsequent Quebec history. See Manitoba (supra) 1915. See also New Brunswick (supra) 1925 but note (infra) that New Brunswick may have retraced its steps.

(26) Stat. P.E.I. 1913 Ch. 7 s. 14.

2. "The owner of a motor vehicle shall be responsible for any violation of this act or of any regulation prescribed by the Lieutenant Governor in Council, unless at the time of such violation the motor vehicle was in the possession of a person not being in the employ of the owner but of a person who had stolen it from the owner."

I have no Prince Edward Island cases construing this section.

III.

The above outline should present a picture of the law in the various provinces up to the decision of *Hall v. The Guelph Express*. From the foregoing discussion I think it is clear that the legislation which made the owner responsible for violations of the acts was ambiguous in that it gave the courts great difficulty in determining whether the responsibility was civil or penal. It is interesting to note that although both Ontario and Alberta started out by placing a dual interpretation upon the phrase "shall be responsible" they subsequently concluded it meant one thing only, and they came to different conclusions as to which meaning was intended. All of the other provinces in which the section came up for construction, British Columbia, Saskatchewan and Quebec, came to the conclusion that penal responsibility only was intended. In Quebec in view of the Amendment to Section 11 in 1926, this was an erroneous decision.

But a more subtle difficulty lurked in this incompletely thought out legislation; and that was, *if* the section was meant to impose civil liability, was that civil liability to arise irrespective of fault on the part of anyone connected with the car? The problem presented itself in the case of *Hall v. The Guelph Express*. This case came up on alleged misdirections to the jury by Mr. Justice Orde, who had balked at applying the Ontario interpretation to a case which involved this last-mentioned difficulty.

The assumed facts of the case were as follows: the tail-light on the defendant's car unexpectedly and without fault on the part of anyone, ceased to function a few moments before a following car overtook and, because of the absence of the warning tail-light, crashed into the rear of the defendant's car and sustained damage in so doing. The Highway Traffic Act then in force (27) provided by Section 9 a series of penalties for failure to have a tail-light burning. The penalties began with $5.00 for the first offence, gradually increased for subsequent offences, were imposable irrespective of fault, knowledge or negligence, and were not

(27) R.S.O. 1927 Ch. 161.

very serious. As already pointed out, the Ontario courts had incautiously committed themselves to a construction of Section 41 as imposing civil liability.

Faced with the dilemma of declaring that this construction was unwarranted or of reaching what they considered to be the unavoidable result of such construction, the Ontario Court of Appeal avoided making any decision (28) and held the defendant not liable on the facts on the theory that the plaintiff had failed to get a finding of fact that the tail-light really was out. On appeal the Supreme Court of Canada (29) showed no disposition to question the earlier construction and ordered a new trial on the theory that the defendant would be liable if his tail-light was out at the time of impact.

The Supreme Court felt that the matter was settled beyond doubt by *The Mostyn* (30) in which case it had been decided by a divided court that a statute which made the owners of a vessel liable for damage done by the vessel to a harbor, dock, or pier, meant that such liability for damage arose irrespective of fault on the part of the owner or the navigators. This taking *the Mostyn* as a starting point for reasoning of course assumed the question of the correctness of the Ontario construction. When the Ontario Legislature learned from the Hall case what it had enacted in 1906 it was aroused to sudden activity. It repealed its section 41 of the Highway Traffic Act, and substituted therefor the following:

> 1929 Ch. 68, s. 9. "The owner of a motor vehicle shall incur the penalties for any violation of this Act . . . and the driver of a motor vehicle, not being the owner, shall incur the penalties provided for such violation."

The substitution of "shall incur the penalties for" for "shall be held responsible" meant to and did do away with the *Hall* case. As a result of this piece of legislation, Ontario joined Alberta, British Columbia, Saskatchewan and Quebec, in that an owner was penally liable under the Act, but his civil liability was no greater than if the Act had never been passed (31). However, the Ontario Legislature did not long rest here, and by Ch. 28, s. 10 of the Statutes of Ontario 1930, 41a was enacted as follows:

(28) 60 O.L.R. 355 Ont. C.A. 1928.
(29) 1929 S.C.R. 92; 1929 1 D.L.R. 375.
(30) 1928 A.C. 27.
(31) See the case of Falsetto v. Brown 1933 O.R. 645 (Ont. C.A. 1933).

41a. "The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of such motor vehicle on a highway, unless such motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle shall be liable to the same extent as such owner."

IV.

After these two amendments Ontario settled down with the owner liable.

A.—*Penal Liability*:
R.S.O. 1937.
Ch. 288, sec. 46.

For all violations of the Act committed by or with his car, unless

(1) He was not in possession at the relevant time, and

(2) His chauffeur (a broad word in the Act) was not in possession at the relevant time, and

(3) The person who was in possession, was in possession without the consent of the owner. The owner has the vurden of proof and must establish 1, 2, and 3 in order to escape the above liability.

B.—*Civil Liability*:
R.S.O. 1937.
Ch. 288, sec. 47.

For all damages caused by the negligent operation of his car unless he proves 1, 2, 3, as above set out.

It may be worth while to bring the other provinces up to date as to A and B in the order in which they have been considered earlier in this paper. In doing this I will endeavor to fit the various provinces within the schematic framework above constructed for the Ontario Act, with such departures for local variations as are unavoidable.

Alberta (Vehicle & Highways Traffic Act)

A.—*Penal Liability*:
Statutes of Alberta 1924.
Ch. 31, sec. 67.
Sec. 68

Same as Ontario except that (a) no (2) chauffeur appears in the scheme of things, and (b) the concept used is "driving" instead of "in possession of".

(c) Special provision if the owner is not driving at the time of the offence he shall not be liable to imprisonment.

(d) The Justice of the Peace or magistrate is empowered to dismiss the case if in his opinion the breach of the statute was committed by accident or misadventure and without negligence.

B.—*Civil Liability*:
Amendment to above, by Statutes of Alberta 1933. Sec. 5 to become Sec. 71 (a).

(a) Every person living with and as a member of the family of the owner is deemed to be the agent or servant of the owner employed as such and deemed (32) to be driving in the course of his employment. Ontario has nothing like this.

(b) Any other driver who has acquired possession with consent is deemed the same as in (a).

(c) No chauffeur in the picture.

A comparison with these provisions with those in Ontario will show that the liability both civil and penal is both more and less extensive in Alberta than in Ontario, and there is sufficient difference in the statutory phraseology to make many of the decisions in either province of little assistance in interpreting the Acts of the other.

British Columbia (Motor Vehicle Act)

A.—*Penal Liability*:
R.S.B.C. 1936. Ch. 195, Secs. 74, 75, 76.

(a) Very detailed provisions reaching a result substantially the same as that in Ontario (except that is in Alberta the concept of chauffeur is not used).

(b) A conditional vendor is specifically exempted (he is exempt in all provinces usually by the definition of owner in the Act).

(c) The concept used is "person entrusted with possession by the owner".

(d) The liability extends to violations of the Highway Act, certain

(32) In Poole v. Thompson & McNally 1934 S.C.R. 717 it is said that deemed here creates an irrebuttable presumption; see also Martel v. Dominion Motors 1935 2 D.L.R. 187; 1935 1 W.W.R. 305; Man. C.A.

sections of the Game Act and the traffic by-laws of any municipality (32). The burden of proving the offence was not committed by a "person entrusted" is specifically placed upon the owner.

B.—*Civil Liability*:
Statutes of B.C. 1937.
Ch. 54, Sec. 11, to become Sec. 74a.

Same as Alberta 71a.

Saskatchewan (Vehicles Act)

A.—*Penal Liability*:
R.S.S. 1939.
Ch. 83, Sec. 207.

Owner liable for penalties unless car not operated with his consent express or implied.

B.—*Civil Liability*:
R.S.S. 1939.
Ch. 83, Sec. 144.

Owner under same liability as negligent operator unless the motor vehicle had been stolen from him or otherwise wrongfully taken out of his possession or the possession of any person entrusted by him with the care thereof.

Manitoba (Highway Traffic Act)

A.—*Penal Liability*:
R.S.M. 1940.
Ch. 93, Sec. 80.

Same as Ontario.

B.—*Civil Liability*:
R.S.M. 1940, Ch. 93, Sec. 81.

Same as Alberta.

Quebec (Motor Vehicle Act)

A.—*Penal Liability*:
R.S.Q. 1925.
Ch. 35, Sec. 53.

Very difficult to state. The legislation as set out supra page 10 has undergone no change. If O'Connor v. Wray is correctly decided 53-1 (supra) applies to penal liability only —and it is absolute in words even when the car is driven by a thief. But O'Connor v. Wray was not a penal prosecution.

Let 53-3 speak for itself. See supra page 10. It does provide that an owner may be made liable for a penalty if he is in the vehicle or

whether he is or is not if his chauffeur is driving, but the court in all cases has the discretionary power of imposing the penalty or not as it thinks fit.

B.—*Civil Liability*: R.S.Q. 1925. Ch. 35, Sec. 53-1.	Very difficult to state. O'Connor v. Wray leaves it practically unaffected by the Motor Vehicle Act. But O'Connor v. Wray cannot be a correct decision on this point.
R.S.Q. 1925, Ch, 35, Sec. 11. As amended: Statutes of Quebec 1926, Ch. 19, Sec. 3, and further amended Statutes of Quebec 1930, Ch. 31.	Past owner liable until notice of transfer forwarded to registration bureau.

New Brunswick (Motor Vehicle Act)

A.—*Penal Liability*: Statutes of New Brunswick 1935, Ch. 20, Sec. 52-2. 1936, Ch. 36, Sec. 9—to become Ss. 4.	Ss. 2. Owner liable for all offences committed by person entrusted [by owner] with possession of such motor vehicle. Ss. 3. Owner guilty of the offence committed by his driver if owner fails to give name and address of his driver ("entrusted") and also an additional special offence. Ss. 4. Fact of ownership *prima facie* evidence that owner was driving.
B.—*Civil Liability*: Statutes of New Brunswick 1934, Ch. 20, Sec. 52, Ss. 2. (Statutes for 1940 not available.)	The section may well be quoted in full: "The owner of a motor vehicle for which a certificate of registration is issued under this Act, or any non-resident owner operating a motor vehicle in the Province of New Brunswick shall be guilty of any violation of this Act or of the regulations thereunder, committed by any person entrusted with the possession of such motor vehicle as well as the person who actually committed the offence; but where the motor vehicle is in the possession of a person under a contract by which he may become the owner of such motor vehicle upon full compli-

ance with the terms of the contract, and in whose name alone the certificate of registration is issued the person who is so in possession shall for the purposes of this section be deemed the owner and nothing in this section shall impose any liability on any other person as owner of such motor vehicle, nor shall it affect civil liability."

Statutes of New Brunswick 1935, Ch. 20, Sec. 31.

Rather complicated section imposing civil liability (for damages caused by negligent driving) upon proprietor of commercial "Drive Yourself" car.

My conclusion for what it is worth is that this section does *not* impose civil liability on the owner (nor is there any other section which does except 31 within its narrow limits). The early part of the section though ambiguous is more aptly referable to penal than civil proceedings "shall be guilty . . . as well as the person who actually committed the offence".

The provisions exempting the conditional vendor might better have been taken care of in the usual manner by the definition of the word "owner" if indeed they are necessary at all. After these provisions follows the clause "Nor shall it affect civil liability". Now are those words referable to the conditional vendor only, or to the whole subsection? It would have been so easy to have used apt words to express either meaning that the fact that such words were not used can be used for an argument looking either way with equal validity.

Subsection 1 of 52 which takes away the right of action of a gratuitous passenger takes it away as against both owner and driver, and might lead to the inference that the Legislature thought that the owner would be liable as owner without such a section. But the section is cast in words so similar to the corresponding section in other provinces, that any inference as to specific New Brunswick intent is dangerous.

Can any safe inference be drawn from section 48, which provides:

"Nothing in this Act shall be construed to affect the common law right of any person to prosecute or defend a civil action for damages by reason of injuries to person or property resulting from the negligent use of a public highway by any person operating a motor vehicle".

If this means anything in this connection it means: nothing in this Act shall affect a common law defence. The fact that the driver was not driving as the owner's servant would normally be a complete common law defence. The further fact that 52 subsection 1 (the gratuitous passenger section) specifically refers to and says notwithstanding section 48 does justify the inference that the New Brunswick Legislature thought that 48 was an important section which it was necessary to dispose of definitely before words put into the Act could effectively affect a civil right of action.

Nevertheless this argument would prove too much because it makes section 48 completely nullify section 31 (see supra) which imposes civil liability on commercial renters. On the other hand 31 is meaningful and necessary only on the hypothesis that 52-2 does not impose civil liability on any owner who falls within its terms.

In support of the view I have taken, I would suggest further: (1) That *it* obviously refers to "this section" [sic subsection] in the line above, and therefore really says: and this section [sic subsection] (not a part of it) shall not affect civil liability. (2) In 1934 the New Brunswick Legislature must have known that the first part of its section was far from clearly referable to civil liability and that there were various techniques in practice for imposing civil liability. (3) Even if (1) is unsound the earlier part of the section 52 is less referable to civil liability than were the Ontario, Alberta British Columbia and Saskatchewan original sections (see supra). But why did New Brunswick in 1934 retrace its steps?

Nova Scotia

A.—*Penal Liability*: Statutes of N.S. 1938. Ch. 34, Sec. 192.	Owner incurs penalties unless driver in possession without consent.
B.—*Civil Liability*: Statutes of N.S. 1938. Ch. 43, Sec. 180, Ss. 3 & 4.	(3) Operator deemed servant unless proof otherwise. (4) Where operator named member of family of owner operator deemed servant unless proof otherwise.

This is clearer than several earlier drafts but the family car doctrine varied in the American jurisdictions which recognized it. Apart from its incorporation of the family car doctrine (4) is already included in (3).

Prince Edward Island (Highway Traffic Act)

A.—*Penal Liability*: Same as Alberta.

Statutes of P.E.I. 1936.
Ch. 2, Sec. 64.

B.—*Civil Liability*: Same as Alberta.

Statutes of P.E.I. 1936.
Ch. 2, Sec. 65.

V.

At the present date the liability imposed on an owner (whether he be the operator or not) is explicitly or impliedly made conditional upon the failure of the owner to disprove negligence or improper conduct in the operation of such vehicle. I do not know whether improper conduct (which phrase is used in some of the Acts) is meant to be a synonym for negligence and as such is merely an example of legislative tautology, or is meant to cover an intentional assault with a motor vehicle by the driver—although why the legislators should decide to make the owner (who is not the driver) liable under such conditions is difficult to understand. Does it by any chance mean any and all improper conduct which is not negligent and not wilful—for example mere violation of any of the many provisions of the Act would probably constitute improper conduct—and are those provinces where Ontario was at the date of *Hall v. Guelph Express*? This is a problem with which the courts may be forced to wrestle in the near future.

On the other hand it is clear that the Ontario legislature intended to abrogate the law as set out in the Hall case, and I believe that its words in the light of the local history are apt. In fact in the case of *Falsetto v. Brown* the Ontario Court of Appeal decided that such was the effect of the repeal of the old 41 and subsequent enactment of the new 41 and 41 (a).

However, it may some day be argued that even this matter is not free from doubt and that doubt arises from the case of *Lochgelly Coal Co. v. MacMullan* (33). In this case their Lordships may be alleged to have decided that when a statute provides a penalty for failure to perform an absolute statutory duty, failure to perform such a duty necessarily constitutes personal negligence on the part of the person upon whom such duty

(33) 1934 A.C. 1. 1932 T.L.R. 566.

is imposed. The case is complicated, and arose out of the Workmen's Compensation Act, which took away an employee's right of action against his employer excepting, *inter alia,* a case in which the injury was caused by the personal negligence of his employer. This negligence is called statutory negligence and has all the earmarks of a fiction unless the word negligence is to be given such a wide meaning that it loses all semblance of having any real meaning whatever. In the case the word "personal" likewise is given a very peculiar meaning, but its warping is so intimately connected with the felt exigencies of the case itself that it is doubtful if any serious attempt will be made to apply the new definition of this phrase to other types of cases.

Nevertheless, that the case is potential dynamite may perhaps be seen from a quotation from Lord Wright's reasons for judgment (34): "A few years earlier and before the Workmen's Compensation Act, 1927, in the Scotch case of *Kelly v. Glebe Sugar Refining Co.* (35) Lord Adam said, at page 833, 'The neglect of the statutory provision creates a *prima facie* case of fault against the factory owners which will render them liable in damages to their employees'. In 1895 in Ontario Chancellor Boyd described a failure to guard dangerous machinery as 'per se evidence of negligence'. I prefer the latter description (per se evidence of negligence) to the former (*prima facie* case of fault), but in either case the judges are in effect describing the breach of the statute as negligence." It is respectfully submitted that there is a great deal of difference between saying that a thing is *prima facie evidence* or *per se evidence* of negligence—and saying that it *is* negligence, or to use the language of fiction conclusive evidence of negligence—and a willingness to ignore such distinctions in meaning, although it may in one case enable a court to reach a desired result must in the long run bring its progeny of confusion.

One wonders whether their Lordships' desire to dispose of an awkward point which had lain undetected for some thirty-seven years (36) did not lead them to reason arguendo and carried by the momentum so engendered put the effect of the violation of a care-inducing statute more strongly than they otherwise would have done. It will be interesting to see the line

(34) 1934 A.C. 1, 27.
(35) 20 R. 833, 835 (1893).
(36) See Rudd v. Elder Dempster 1933 1 K.B. 566 (C.A.), especially Scrutton L.J. 584-588.

of distinction which will be drawn when the point is squarely raised, but in the meantime the case raises some very difficult problems.

Among others, what now is the liability of the owner of a motor car on the facts of the Hall case? Is an owner guilty of "statutory negligence" if without fault on the part of anyone his automobile is so operated by a friend to whom he has loaned it as to violate one of the minor provisions or regulations made under any of the provincial Motor Vehicles Acts? Has section 41a of the Ontario Act become superfluous and section 71a of the Alberta Act wholly unnecessary despite *Johnson v. Mosher* (supra) simply by virtue of the *Lochgelly* case? Or, to deal with a less complicated case, suppose that A, driving carefully, is suddenly faced with an emergency in which rapid acceleration affords the only possible method of avoiding a collision with X. He speeds up and successfully avoids X, but collides with Y who suddenly enters the highway from a hidden side road. A could have stopped in time to avoid hitting Y had it not been for his slightly excessive speed. A jury is ready to say that A adopted the only reasonable and proper course of conduct under the circumstances. Is he nevertheless guilty of statutory negligence because he exceeded the speed limit? Surely not. It is to be hoped that this type of case comes up before we become enslaved by the phrase "statutory negligence".

Of course the *Lochgelly* case could be confined to its facts in any one of several degrees of confinement, but that is not the usual fate of a House of Lords case in colonial courts. It might not be amiss to suggest that in a sense the *Lochgelly* case in so far as its application to the present problem is concerned, puts the cart before the horse. The most that the *Lochgelly* case can be said to have decided is that *if* a civil liability is intended to be imposed for the breach, regardless of fault, of a care-inducing statute, it necessarily follows that the breach of that statute was negligence and the liability so imposed is a liability for personal negligence within the meaning of the Workmen's Compensation Act. The case does not purport to decide that the breach of a care-inducing statute will necessarily and in all cases constitute negligence, and hence constitute a ground of liability, although the language of their Lordships indicates that such is their opinion.

It is submitted that the first proposition which is implicit in the language of their Lordships(though possibly not in the decision itself because the language overshot the plaintiff's contention, which was that the breach was *prima facie* evidence of negligence, and personal or certain other specified

negligence, might be established if the case went to trial) is purely an arguendo statement evoked by the peculiar circumstances of the case, and that the second proposition is not deducible from it.

But it must be noted that the *Lochgelly* case has already led Mr. Stallybras (who thinks it an epoch-moking decision) (37) to argue that since the decision *Rylands v. Fletcher* (38) can now be considered a branch of the law of negligence (39).

This argument is of a very different tenor from that of Ezra Ripley Thayer (40) to the effect that *Rylands v. Fletcher* should have been decided on negligence, though curiously enough Thayer was one of the first to argue in another vein (41) that the violation of a care-inducing statute should constitute negligence The two writers above referred to however mean very different things by the word negligence. Thayer I think means conduct characterized by undue risk in which our ideal ordinary reasonable prudent man would not indulge. Stallybras appears to mean conduct upon which liability is predicated whether "negligent" in that sense or not.

M. M. MacIntyre.

(37) Salmond Torts 8th ed. (Stallybras), 1934, VIII.
(38) 3 House of Lords, 330 (1868).
(39) Salmond Torts 8th ed. (1934), 597-599.
(40) Liability with Fault (1916) 29 Harv. L. Rev. 801.
(41) Public Wrong and Private Action (1914), 27 Harv. L. Rev. 317.

Control of Aliens in the British Commonwealth of Nations—By C. Fred Fraser—The Hogarth Press, Demy. 8 Vo., pp. 304, 12s 6d (1940).

This book is a thorough study which analyses and discusses the legislation, administrative practice and relevant judicial decisions governing nationality, admission, exclusion and expulsion of aliens, the status of aliens and the naturalization of aliens in (1) The United Kingdom, (2) Eire, (3) Northern Ireland, (4) The Dominion of Canada, (5) The Commonwealth of Australia, (6) The Dominion of New Zealand, and (7) The Union of South Africa seriatim. The study is not entirely expository. Mr. Fraser distributes through his pages enlightened criticism.

By and large, however, and with some exceptions, as Mr. Fraser demonstrates, the man or woman born into another national group is welcomed and decently treated by the member states of the British Commonwealth of Nations. The United Kingdom stands pre-eminent in this respect. Recently it has afforded asylum to large numbers of political refugees fleeing social revolutions. This is in accordance with the comman law tradition which is an individual-respecting, liberty-loving body of doctrine. Indeed, practically all of Mr. Fraser's criticisms proceed from the premise that administrative agencies which administer most of the law relating to aliens do not afford the safeguards to individuals inherent in judicial procedure; and that the courts themselves have unnecessarily abdicated to administrative tribunals under legislation which did not compel them to do so. This is a point of wider significance. The trend toward administrative absolutism can be hastened by courts which interpret legislation in such a manner as to leave administrative agencies free from judicial review. On the other hand it can be delayed and perhaps occasionally prevented by judicial insistence that absolute and unconditional power in any sphere must be clearly spelled out, because such a bill which actually shows its teeth has a fair chance of suffering modification in its journey through the legislature.

Probably chapter III, pp. 89-129 inclusive, which is concerned with the Dominion of Canada is of most value to Canadian lawyers who may have problems arising out of aliens in this country. In it, as in other chapters, not only is the relevant legislation set out and the administrative practice described, but a number of well-known cases are acutely discussed.

It seems to this reviewer that all countries labor under a peculiar economic fallacy in formulating an immigration policy. This may be

described as the fallacy of the over-emphasis of the immediate phenomenon. It is generally thought that an immigrant increases native unemployment because he may displace a person presently employed or obtain employment which some native would otherwise obtain, and there the thinking apparently stops. The fact that the employed alien by his spending or investment must necessarily create as much employment as he displaces, and that the community to which he comes actually receives without previous investment whatever trained ability he brings with him, is usually overlooked. Possibly in a legislative field more than usually subjected to pressure groups seeking immediate objects, it would be too much to expect wider considerations not to be lost sight of; and it is true that during a depression a short term policy of exclusion may have sufficient present value to justify some impairment of the generally larger values of a long term policy.

Mr. Fraser's final chapter is short. It deals with effect of war on the status of neutral and enemy aliens generally, and sets out the special regulations which became law after the outbreak of hostilities in September, 1939. In it the entire emphasis is placed on the United Kingdom and the Dominion of Canada.

M. M. M.

ROBERT MONSEY ROLFE, BARON CRANWORTH (1790-1868)

Born in Norfolk on the 18th of December, 1790, Robert Monsey Rolfe was destined to occupy, in the field of law, a position only less distinguished than that of his second cousin, Admiral Lord Nelson, and to become Baron of that village over which his father had ministered as curate. He received his early education at the grammar schools of Bury St. Edmunds and Winchester, and his university training at Cambridge, where, in 1815, he was awarded the degree M.A. and was elected a Fellow of Dowring College. Resolved to pursue the study of law, young Rolfe, at the age of twenty-two entered Lincoln's Inn, and on the 21st of May, 1816, he was called to the Bar.

His progress as a junior was slow, but in the Chancery Courts, Rolfe acquired a wide and thorough knowledge of the principles of equity, which proved invaluable to his later work as a judicial reformer in the House of Lords. In 1832, he was admitted to the Inner Bar, and at about this same time, running as a Whig candidate, he was elected to the House of Commons. Notwithstanding the fact that he took scarcely any part in the debates of the House, Rolfe was appointed Solicitor-General by Lord Melbourne's government, and held that office for a period of four years, at the end of which time, he was knighted. On the 11th of November, 1839, succeeding Sir William Henry Maule, he was appointed Baron of the Exchequer.

Although he was best-versed in the law of the Courts of Chancery, Rolfe had acquired considerable experience in criminal law while sitting as recorder of Bury St. Edmunds, and therefore, after his elevation to the Bench, he presided over many trials such as those of the chartists, which aroused to fever pitch, the popular passions of the day.

In 1850, Rolfe was appointed Vice-Chancellor, and a short time later, he became a member of the Privy Council. On December 20th, 1850, he was created Baron Cranworth of Cranworth, and on the formation of Lord Aberdeen's cabinet just one year later, Cranworth became Lord Chancellor, taking his seat on the woolsack as speaker of the House of Lords. From this time onwards, Lord Cranworth devoted all his energies to the reformation of both the administrative and substantive law.

Almost immediately, he announced the government's intention to consolidate and simplify the statute laws, and boldly proposed such steps as

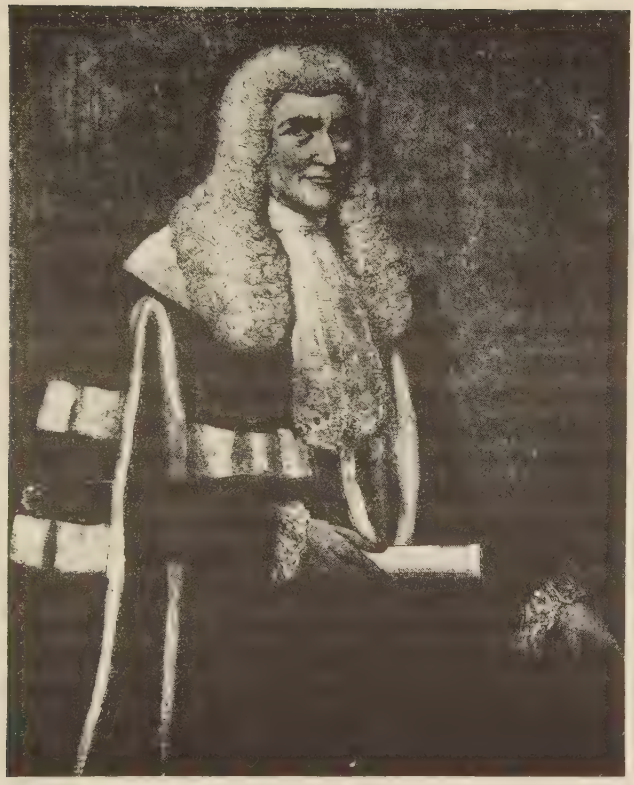
would facilitate the creation of a "*Code Victoria*". In the following year, a Royal Commission which Cranworth himself headed, investigated the question, and although no such complete revision as Cranworth envisaged ever materialized, a great number of reforms *were* effected. Among his achievements were several bills for the *Amendment of the Common Law Procedure, An Act for the Better Administration of Charitable Trusts,* a bill *To Facilitate Leases and Sales of Settled Estates,* and the famous *Transportation Bill* which substituted penal servitude in lieu of the old system of transportation to penal colonies.

Lord Cranworth's name is also associated with the *Endowed Schools Bill* of 1860, which permitted the children of dissenters to enjoy the benefits of "*King Edward's Schools*", and with the *Capital Punishment Amendment Bill* of 1866, which was approved by the Lords, but withdrawn by the House of Commons. With the object of facilitating transactions in land, *Lord Cranworth's Act* (23 & 24 Vict. Cap. 145), shortening the form of conveyances, was passed. Bankruptcy, criminal law, conveyancing, procedure, education and religion were all within the wide province of his reformist zeal. On the 26th of July, 1868, almost in the midst of the most active portion of his carer, Lord Cranworth died in London after a brief illness. There were no children of his marriage, and upon his death, the peerage became extinct.

Of Lord Cranworth, it may be said that he upheld the high traditions of the Lord Chancellors of England. As a lawyer, he was a sound scholar and a sincere advocate; as a judge, he exhibited great patience and acute perception. As a parliamentarian, he was not a forceful speaker, but though destitute of eloquence and wit, his speeches were always listened to with respect. As a reformer, he was handicapped by his extreme caution and timidity which often was a hindrance to the sweeping measures proposed by his contemporary, Lord Westbury. Yet, in this very wariness and circumspection lay the secret of much of the permanence and success of the reforms which he effected.

Through his long and distinguished career he enjoyed great popularity. In writing of him, Lord Campbell says: "No one is so agreeable as Rolfe—a clear head, vivacity, information, an extraordinary pleasantness of manner, extreme good humor, cheerfulness and tact, make his society as attractive as that of anybody I ever met!"

Alan Brownlee.



Robert Monsey Rolfe, Baron Cranworth (1790-1868)

SUMMARY
OF THE MINUTES OF THE SEVENTY-FIFTH MEETING OF THE BENCHERS OF THE LAW SOCIETY OF ALBERTA, IN CONVOCATION ASSEMBLED, AT THE COURT HOUSE, CALGARY, ALBERTA, ON FRIDAY, THE THIRD DAY OF JANUARY, A.D. 1941.

DISCIPLINE:

The Benchers considered two complaints against two Barristers and Solicitors, one which had been investigated by a Committee in the first half of the year and adjourned for consideration to this meeting, the other having been investigated by a Committee during the last half of the year.

The Benchers found one solicitor not guilty of conduct unbecoming a Barrister and Solicitor.

Consideration of the complaint against the other Barrister and Solicitor was adjourned to the next regular Convocation.

Consideration of a complaint against another Solicitor was adjourned to next regular Convocation.

REPORT OF SECRETARY:

The report of the Secretary for the half year ending December 31st, 1940, contained the following information:

Member admitted during the half year from the Law Society of Upper Canada	1
Students-at-law admitted during the half year	6
Students-at-law enrolled during the half year	9
Member suspended for non-payment of 1940 Annual Fee—reinstated	1
Member suspended for non-payment of 1940 Assurance Fund Levy—reinstated	1

Number transferred to non-practicing list	7
Number previously on non-practicing list resuming practice	3
Number on Roll	1,244
Number on active practicing list to whom Annual Practicing Certificates have been issued	517
Number on active practicing list who have enlisted for military service	31

DEATHS:

William Chartres, Mayerthorpe, June 20th, 1940.

W. Austin Brown, Calgary, July 9th, 1940.

William P. Taylor, K.C., Calgary, July 26th, 1940.

Frank Baird, Redcliff, August 27th, 1940.

E. B. Cogswell, K.C., Edmonton, November 10th, 1940.

The Honourable Mr. Justice Alexander Andrew McGillivray, Edmonton, December 12th, 1940.

REPORT OF TREASURER:

STATEMENT OF RECEIPTS AND PAYMENTS

For the half year ended 31st December, 1940

GENERAL FUND

Receipts:

Admission fee of barristers		$2,410.00
Annual fees and reinstatements		107.00
Enrolment fees of students		440.00
Assignment of articles		5.00
Special certificates		2.00
Interest on bonds		454.01
		$3,418.01
Examination fees		35.00
Annual fees received on 1941 account		460.00
Transfer from Relief Fund		987.50
		$4,900.51
Bank balance 1st July, 1940		4,771.51
		$9,672.02

Payments:

Salaries:		
Secretary and solicitor	$1,500.00	
Auditors	75.00	
Librarians	540.00	$2,115.02

General expense:		
Exchange and interest	$ 27.33	
Printing and stationery	179.17	
Postage and sundries	189.43	
Library expenses	29.44	
Treasurer's bond	40.00	
		465.37
Convocation expenses		310.95
Canada Law Reports		524.00
Discipline Committee costs and expenses		235.64
		$3,650.98
Examination fees		35.00
Books purchased for libraries:		
Calgary	$ 645.21	
Red Deer	162.85	
Wetaskiwin	161.60	
Edmonton	651.63	
Grande Prairie	76.45	
Macleod	111.69	
Lethbridge	274.07	
Medicine Hat	212.51	
Vegreville	82.35	
		2,378.36
Purchase of Dominion of Canada Second War Loan bonds, $1,000, 3%, 1952		987.50
		$7,051.84
Bank balance—31st December, 1940		2,620.18
		$9,672.02

Relief Fund

Receipts:		
Bank balance 1st July, 1940		$2,961.19
Refund of taxes on Red Deer property	$ 147.90	
Interest on Knox Church mortgage	200.00	
Interest on bond	4.75	
Instalments received on agreement of sale of Red Deer property	300.00	
		652.65
		$3,613.84

Payments:		
Grants for relief	$ 420.00	
Fees re sale of Red Deer property	25.00	
Purchase of Dominion of Canada Second War Loan bonds, $800, 3%, 1952	790.00	
		1,235.00
Transferred to General Fund		987.50
Bank balance 31st December, 1940:		
Capital account	$ 269.79	
Revenue account	1,121.55	
		1,391.34
		$3,613.84

ASSURANCE FUND

Receipts:		
Bank balance 1st July, 1940		$2,105.63
Levy for 1940	$2,440.00	
Interest on bank savings account	10.21	
Interest on bonds	48.75	
		2,498.96
		$4,604.59
Payments:		
Purchase of Dominion of Canada Second War Loan bonds, $3,200, 3%, 1952		$3,160.00
Bank balance (savings account) 31st December, 1940		1,444.59
		$4,604.59

ALBERTA LAW SOCIETY

STATEMENT OF RECEIPTS AND PAYMENTS

For the year ended 31st December, 1940

GENERAL FUND

Receipts:	
Admission fees of barristers	$4,660.00
Annual fees and reinstatements	7,701.00
Enrolment fees of students	720.00
Assignment of articles	10.00
Fees on special petitions	10.00
Special certificates	6.00
Interest on bonds	905.08
	$14,012.08

Examination fees		204.00
Annual fees received on 1941 account		460.00
Transfer from Relief Fund		987.50
		$15,663.58
Bank balance 1st January, 1940		832.00
		$16,495.58

Payments:

Salaries:		
Secretary and solicitor	$3,000.00	
Auditors	150.00	
Librarians	1,015.04	
		$ 4,165.04
General expense:		
Exchange and interest	$ 53.08	
Printing and stationery	402.92	
Postage, petty cash and sundries	343.69	
Treasurer's bond	40.00	
Library expenses	67.69	
		907.38
Convocation expenses		649.30
Canada Law Reports		1,055.00
Discipline Committee costs and expenses		618.18
		$ 7,394.90
Examination fees		204.00
Books purchased for libraries:		
Calgary	$1,424.50	
Red Deer	275.63	
Wetaskiwin	279.33	
Edmonton	1,529.82	
Grande Prairie	156.00	
Macleod	300.11	
Lethbridge	594.82	
Medicine Hat	395.19	
Vegreville	83.60	
	$5,039.00	
Vegreville—second instalment	250.00	
		5,289.00
Purchase of Dominion of Canada Second War Loan bonds, $1,000, 3%, 1952		987.50
		$13,875.40

Bank balance—31st December, 1940		2,620.18
		$16,495.58

Relief Fund

Receipts:

Bank balance 1st January, 1940		$2,126.24
Rentals of Red Deer property		450.00
Interest on Knox Church mortgage		400.00
Interest on bond		9.75
Amounts received on agreement of sale of Red Deer property		1,100.00
		$4,085.99

Payments:

Grants for relief		$ 760.00
Expenses of Red Deer property:		
Commission and repairs	$ 26.50	
Taxes—less proportion refunded by purchaser	105.65	
		132.15
Fees re sale of Red Deer property		25.00
Purchase of Dominion of Canada Second War Loan bonds, $800, 3%, 1952		790.00
Transferred to General Fund		987.50
Bank balance—31st December, 1940:		
Capital account	$ 269.79	
Revenue account	1,121.55	
		1,391.34
		$4,085.99

Assurance Fund

Receipts:

Bank balance 1st January, 1940	$5,070.00
Levy for 1939—2 members	20.00
Levy for 1940—488 members	2,440.00
Interest on bank savings account	25.84
Interest on bonds	48.75
	$7,604.59

Payments:

Purchase of Dominion of Canada bonds:		
First War Loan, $3,000, 3¼%, 1952	$3,000.00	
Second War Loan, $3,200, 3%, 1952	3,160.00	
		6,160.00
Bank balance (savings account)—31st December, 1940		1,444.59
		$7,604.59

RECONCILIATION OF GENERAL FUND SURPLUS ACCOUNT

For the year ended 31st December, 1940

Balance 1st January, 1940		$137,053.38
Additions:		
Receipts as per cash statement	$14,012.08	
Adjustments of discounts on bond investments	85.70	
Annual fees for 1940 received in 1939	540.00	
Increase in balance in hands of Chief Librarian	4.83	
Increase in accrued interest on bonds	7.50	
Decrease in liability for Canada Law Reports	11.00	
Transfer from Relief Fund	987.50	
		15,648.61
		$152,701.99
Deductions:		
Payments as per cash statement	$7,394.90	
Depreciation of libraries	4,723.21	
Decrease in unexpired insurance	308.98	
		12,427.09
		$140,274.90

BALANCE SHEET—31st DECEMBER, 1940

GENERAL FUND

Assets:

Libraries:		
Valuation as at 31st December, 1939		$115,411.00
Amounts paid during the year ended 31st December, 1940		5,039.00
		$120,450.00
Less amount reserved for depreciation		4,723.21
		$115,726.79

Divided as follows:		
Calgary	$32,554.43	
Red Deer	6,630.17	
Wetaskiwin	7,230.71	
Edmonton	32,886.47	
Grande Prairie	2,312.10	
Macleod	10,103.07	
Lethbridge	13,675.58	
Medicine Hat	9,546.47	
Vegreville	787.79	
		115,726.79
Furniture cost $761.80 (at nominal value of)		1.00
Law libraries, English reprints		740.88
Investments:		
Province of Alberta 4½% bonds ($4,100 par)	$3,897.16	
Province of Alberta 4% bonds ($2,000 par)	1,934.11	
Province of British Columbia 4½% bonds (P.G.E. Railway, $1,000 par)	990.58	
City of Calgary 4½% bonds (£2,100 par)	9,472.03	
City of Edmonton 4½/5% bonds ($5,000 par)	4,292.06	
Calgary School District 5% bonds ($500 par)	432.40	
Dominion of Canada Second War Loan bonds, 3%, 1952 ($1,000 par)	987.77	
		22,006.11
(Market value of bonds about $20,600)		
Accrued interest on bonds		396.34
Petty cash in hands of Chief Librarian		10.60
Balance at bank—31st December, 1940		2,620.18
		$141,501.90
Liabilities:		
Annual fees received on 1941 account		$ 460.00
Canada Law Reports		517.00
Third instalment on purchase of library for Vegreville not yet due		250.00
Surplus		140,274.90
		$141,501.90

Relief Fund

Capital Account:

Assets:		
Province of Alberta bond 4% 1957 ($500 par)	$483.55	
Dominion of Canada Second War Loan bonds, 3%, 1952 ($800 par)	790.17	
		$ 1,273.72
(Market value of bonds, $1,108)		

Loan on mortgage—Knox Church, Calgary	8,000.00
Agreement of sale of Red Deer property	2,900.00
Balance at bank—31st December, 1940	269.28
	$12,443.00

Liabilities—Nil.

Surplus	$12,443.00

REVENUE ACCOUNT:

Assets:

Interest on Knox Church mortgage, due 1st January, 1941	$ 200.00
Accrued interest on bonds	6.83
Accrued interest on agreements of sale	89.53
Balance at bank—31st December, 1940	1,122.06
	$1,418.42

Liabilities—Nil.

Surplus	$1,418.42

ASSURANCE FUND

Assets:

Bank balance (savings account)		$1,444.59
Investments:		
Dominion of Canada bonds:		
First War Loan, 3¼%, 1952 ($3,000 par)	$3,000.00	
Second War Loan, 3%, 1952 ($3,200 par)	3,160.79	
		6,160.79
(Market value of bonds, $6,182)		
Accrued interest on bonds		64.62
		$7,670.00

Liabilities—Nil.

Amount of Fund	$7,670.00

REPORT OF AUDITOR:

The Auditors' Report contained the following certificate:

"We report that we have obtained all the information and explanations which we have required and that in our opinion the attached

Balance Sheets as at 31st December, 1940, have been properly drawn up so as to exhibit a true and correct view of the state of the Society's affairs, according to the best of our information and the explanations given to us and as shown by the books of the Society.

"Williams & Williams,"
Chartered Accountants,
Auditors of the Law Society of Alberta."

REPORT OF SOLICITOR:

The Solicitor reported that during the half year he had appeared for the Society on the investigation of one complaint against one solicitor.

The Solicitor reported that he had appeared as Counsel for the Society on the appeal of James Alexander McCaffry from the decision of Mr. Justice Shepherd dismissing his action against the Society. The appeal was dismissed. The solicitor further reported that the solicitor for Mr. McCaffry intimated that leave to appeal to the Supreme Court of Canada would be applied for.

DISCIPLINE COMMITTEE:

The report of the Chairman of the Discipline Committee dealt with ten complaints which in his opinion did not justify further investigation.

COMMITTEE ON UNAUTHORIZED PRACTICE:

The report of the Chairman dealt with one complaint on which no action was taken.

RE ASSURANCE FUND LEVY:

The report of the Chairman of the Finance Committee showed that the total amount collected during 1940 was $2,440.00 and that one claim against the fund of $240.00 was being investigated.

Thirty-two hundred dollars has been invested in Dominion of Canada Second War Loan Bonds.

RE CONFERENCE OF THE GOVERNING BODIES OF THE LEGAL PROFESSION IN CANADA:

The Secretary was instructed to notify the proper officials of the Conference of the Governing Bodies of the Legal Profession in Canada that Convocation approves the suggestion that the Conference draft

uniform standards for submission to the Governing Bodies of the Common Law Provinces in Canada.

RE THE HONOURABLE MR. JUSTICE ALEXANDER ANDREW McGILLIVRAY:

The following resolution was unanimously passed:

"The Benchers of The Law Society of Alberta assembled in this their first convocation following the passing of the late Mr. Justice McGillivray wish to record their deep sense of loss sustained by the Bench and Bar and the public of this Province by his untimely death. Before his elevation to the Bench, the late Mr. Justice McGillivray had attained high national standing as a Counsel and in public life, and his comparatively short incumbency of the responsible position of a judge of the Appellate Division of the Supreme Court of Alberta had fulfilled the expectations held by all who knew him that he would distinguish himself as a jurist. His legal and judicial ability, his industry and high sense of public duty justified the belief that a career of ever increasing usefulness and distinction lay before him. The Benchers personally, in common with all members of the Bar, mourn the loss of a valued associate and a courteous and efficient judge. To Mrs. McGillivray and her son the Benchers express their deep sympathy."

RE USE OF WORDS "AND COMPANY" BY A BARRISTER AND SOLICITOR PRACTISING ALONE.

RE USE OF NAMES OF DECEASED PARTNERS AND THOSE NOT ENGAGED IN THE BUSINESS OF THE PARTNERSHIP AS MEMBERS OF A FIRM.

RE ADVERTISING BY BARRISTERS AND SOLICITORS AS SPECIALISTS IN ANY BRANCH OF THE LAW:

These matters were referred to a Special Committee for consideration and report at the next regular Convocation of the Benchers.

RE LIBRARIES:

The Library Committee was requested to formulate a set of regulations to be conformed to by local librarians; and to report to next regular Convocation as to the remuneration to be paid local librarians.

The President appointed a Special Committee to consider and report to the Benchers on questions arising in respect of members enlisting for military service.

RE INTER-AMERICAN BAR ASSOCIATION:

The Secretary was instructed to advise Mr. D. L. McCarthy, K.C., President of the Canadian Bar Association that the Law Society of Alberta will abide by any decision reached by the Canadian Bar Association in respect of joining the Inter-American Bar Association.

RE APPOINTMENT OF REPRESENTATIVE TO THE SENATE OF THE UNIVERSITY OF ALBERTA:

Mr. J. E. A. Macleod, K.C., of Calgary, was appointed representative of the Law Society of Alberta on the Senate of the University of Alberta, succeeding Mr. H. H. Parlee, K.C., of Edmonton, who by virtue of his appointment as Chairman of the Board of Governors of the University of Alberta is an ex-officio member of the Senate.

RE NEXT MEETING:

The next regular meeting of the Benchers was set for Friday, the 27th day of June, 1941, commencing at ten o'clock a.m., at the Banff Springs Hotel, Banff.

The following Benchers were in attendance:

Messrs. W. E. Payne, K.C., President,
W. S. Gray, K.C., Vice-President.
W. A. Begg, K.C.
W. H. Odell, K.C.
S. W. Field, K.C.
J. E. A. Macleod, K.C.
J. N. Ritchie, K.C.
G. H. Steer, K.C.
L. Y. Cairns, K.C.
S. H. McCuaig, K.C.
C. C. McLaurin, K.C.

"W. E. Payne," *President.*
"E. W. S. Kane," *Secretary.*

APPEALS IN SUMMARY TRIAL AND SUMMARY CONVICTION CASES

Summary Conviction Appeals are Governed by Sections 749-761 of the Criminal Code.

Jurisdiction.

Section 749 ff. places the jurisdiction in the District Court in which the cause of the Information or Complaint arose.

Part 15 of the Code deals only with matters which are under Dominion jurisdiction. Any Provincial offence can be dealt with only if the Provincial statute gives an appeal to the District Court.

The right of appeal is given to the Crown.

The appeal lies even after a plea of guilty "by any party aggrieved", on the ground that the conviction is bad in law, or if the plea of guilty was made under some misapprehension, or if the conviction was made after an objection to the Information or Summons made at the trial.

Rex v. Brook, 7 C.C.C. *at* 216.

Time and Place.

Section 750a provides that the appeal shall be to the first sittings of the Appeal Court to be held after the expiration of fourteen days from the date of the conviction, order or dismissal appealed from.

That is, there must be fourteen clear days or the Court has no jurisdiction to hear the appeal.

Also, the appeal must be directed to the correct sittings or there is not any jurisdiction. A later sitting will not do.

Notice of Appeal.

The Notice of Appeal goes to the jurisdiction of the Court, and must show:—

(a) The name of the appellant;
(b) Intention to appeal;
(c) Conviction or order filed from;
(d) Court filed to, and what sittings;
(e) It must be addressed to someone, usually the informant;
(f) It is not essential, but it ought to show the sentence imposed, if any.

The Notice of Appeal must be filed in the office of the Appeal Court and must be served upon the respondent and Justice who tried the case.

The Notice of Appeal must be filed and served within ten days of the adjudication, or within such further time not exceeding an additional twenty days, as a Judge of the Appeal Court may fix.

Service on a solicitor is not sufficient, unless it is proven that the solicitor is still acting, but service on a Crown solicitor is sufficient. Service on the respondent must be personal.

In computing the ten days, the date of the conviction is excluded.

After Notice of Appeal has been filed, the appellant can be released by the Justice on the appellant entering into recognizance in Form 51 of the Criminal Code; or if a fine only has been adjudged, then by paying such fine and depositing such further amount as the Justice deems necessary to cover costs of appeal.

The giving of this recognizance acts as a stay of proceedings concerning any pecuniary penalty.

Simington and Colbourne 4 C.C.C. 367.

The deposit for costs in the Edmonton District Court is usually set at $25.00.

Payment of the fine does not waive the right of appeal.

Entry of Appeal.

The appeal is entered at the sittings of the Court by the appellant or his solicitor appearing on the opening or during such sittings, before the Court, and proving the filing and serving of the Notice of Appeal and proving the bail and payment into Court of the security for costs. Proof of service may be made by affidavit or orally.

The Court will then set a day for the hearing, which shall be a trial *de novo,* and the parties may call witnesses and adduce evidence whether or not such witness was called or evidence given before the Justice.

The Appeal Court is an absolute judge of facts of law.

The Court may hear the evidence of a witness given at the trial, if it can be shown that the witness is not available at the appeal.

I have been unable to find any authority to say that this applies to the accused. The appeal is a trial *de novo,* and the accused need not take the witness stand, but there is a suggestion in Section 752, subsection (3), that his depositions at Trial may be given on appeal.

The Court may confirm, reverse or modify the decision appealed from.

Any defect in the facts of appeal goes to the jurisdiction of the Court. A Notice of Appeal not being addressed to anyone is bad.

Rex v. Dolliver Mining Company 10 *C.C.C.* 405.

Notice of Appeal to the wrong sittings of the Court is bad.

Rex v. Rekush, 1930 1 *W.W.R.* 669.

However, a new Notice of Appeal may be filed to cover irregularities.

Rex v. Chin Chong, 52 *C.C.C.* 283.

The decision of the Appeal Court is final and cannot be reviewed. However, in spite of Section 1122 of the Code, a writ of certiorari will lie if the jurisdiction of the Court is in question, and a writ of prohibition will lie if there was no evidence to support the conviction.

IN THE DISTRICT COURT OF THE DISTRICT OF NORTHERN ALBERTA
JUDICIAL DISTRICT OF EDMONTON

The King, on the information of

....., Respondent

vs.

....., Appellant

(Name of Appellant)

NOTICE OF APPEAL (Summary Conviction)

Take Notice that the Appellant, ..., of ..... intends to enter and prosecute an appeal at the next sittings of The District Court of the District of Northern Alberta to be holden at ....., in the Province of Alberta, and commencing on the ..... day of ....., A.D. 19....., against a certain conviction dated the ..... day of ....., A.D. 19....., and made by ....., a Police Magistrate or Justice of the Peace in and for the Province of Alberta, whereby the Appellant, ..., was convicted of having on the ..... day of ....., A.D. 19....., at ....., in the Province of Alberta, unlawfully (*set out the nature of conviction as it appears on the record*); and by which conviction the Appellant, ..., is and thinks himself aggrieved.

Dated at ..... this ..... day of ....., A.D. 1938.

.....

Solicitors for the Appellant.

To:

.....of.....(Informant).

.....of.....(Convicting Justice).

.....of.....(Clerk of the Court).

RECOGNIZANCE OF BAIL (Summary Conviction)

CANADA

PROVINCE OF ALBERTA

BE IT REMEMBERED that on the.....day of....., A.D. 19....,

..... of .....

(Name of Appellant)

..... of .....

(Name of Surety)

..... of .....

(Name of Surety)

personally came before me and severally acknowledged themselves to owe our Lord the King, the several sums following, that is to say:

the said.....(Appellant) the sum of.....dollars

and the said.....(Surety) the sum of.....dollars

and the said.....(Surety) the sum of.....dollars

to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lord the King, if he the said.....(Appellant) fails in the condition hereunder written.

Taken and Acknowledged the day and year above mentioned at....., in the Province of Alberta, before

.....

Police Magistrate or Justice of the Peace
in and for the Province of Alberta.

CONDITION

The condition of the above written recognizance is such that if the accused personally appears at the next sittings of the District Court of the

District of Northern Alberta to be holden at ..... on the ..... day of ....., A.D. ....., and tries an appeal against a certain conviction), dated the ..... day of ....., A.D. 19....., made by ....., a Police Magistrate or Justice of the Peace in and for the Province of Alberta, whereby he, the accused, was convicted, for that he, the accused, did on the ..... day of ....., A.D. 19....., (*set out the offence as stated in the conviction*) and also abides by the judgment of the Court upon such appeal and pays such costs as are by the Court awarded, and also attends on all adjournments thereof, then the said recognizance to be void, otherwise to remain in full force and virtue.

Affidavit of Justification by Surety

Canada
Province of Alberta

The King, on the information of

. . . . . .

vs.

. . . . . .

I, ... of ....., in the said Province of Alberta, ..., make oath and say:—

1. That I reside at the address above stated and am of the full age of 21 years.

2. That I am one of the sureties proposed for the said ..... and named in the recognizance attached hereto.

3. That I own property in the Province of Alberta to the value of ..... dollars over and above all encumbrances thereon and all my other debts and liabilities, whether as bail or surety in any other matter or otherwise, and also over and above all exemptions from seizure allowed by law.

4. That particulars of the real and personal property owned by me and of my debts and liabilities are as follows:—

. . . . . .

. . . . . .

. . . . . .

Sworn before me at .....
this ..... day of .....
A.D. 19.....

.....

Police Magistrate or Justice of the Peace
in and for the Province of Alberta.

Summary Trials of Indictable Offences

Part 16 of the Criminal Code

Appeals from convictions on summary trial of indictable offences are governed by Sections 797 and 1013 of the Code. The procedure is governed by the Crown practice rules.

With the exception of subsections (a) and (f) of Section 797, all these cases are appealed to the Appellate Division. Even the offences detailed in subsections (a) and (f) cannot go under Part 15 in a case where a Police Magistrate exercises the power of two justices.

Under the Crown practice rules, the Notice of Appeal prepared by the Appellant or his solicitor is addressed to the Registrar of the Appellate Division, and three copies are sent. The Notice contains the offence, the dates of conviction and sentence, the Court appealed from, the date of trial, the sentence imposed, the relief asked for and whether or not the Appellant will be present at the appeal. The appeal must be filed within one calendar month from the conviction. There is no duty on the Appellant regarding service; the Registrar looks after this. The Registrar sets the case down for the next sittings of the Appeal Court, and in the interim the Trial Judge sends his notes to the Registrar.

Counsel can obtain copies of these notes and incorporate them into his appeal book, of which there are six copies filed.

Under Section 1019 of the Code, the Chief Justice may admit the accused to bail if he sees fit. This is not a matter of right, and it is usually granted with extreme caution.

Section 1013—the appeal is granted as of right on questions of law, and with leave on questions of sentence, facts, or mixed facts and law. The Crown has the right of appeal.

After a plea of guilty there can be no appeal, unless on sentence, or unless the plea was made by mistake, or unless there has been a wrongful entry of the plea of guilty, or unless there is a good defence in law.

Rex v. Alexander, 23 *Cox C.C.C.* 140.
Rex v. Hussy, 18 *C.A.R.* 121.

Section 1014—the appeal will be allowed if the verdict is unreasonable or cannot be supported by the evidence or is wrong in law, or if there is a miscarriage of justice.

Crankshaw's Criminal Code, at page 1196, gives an exhaustive list of cases and comments on this point. However, the general rule is that the Court will not re-weigh the evidence and apply the doctrine of reasonable doubt. It applies the doctrine regarding circumstantial evidence as laid down in the case of *Rex v. McEwen,* 59 *C.C.C.* 78.

Section 1015—gives the power of the Court to deal with sentence.

Within the limits of the law, the Court tends to standardization of sentence.

The Notice of Appeal may be amended by permission of the Appeal Court, but this is exceptional. *Rex v. Berelovitch,* 46 *C.C.C.* 148.

Although the time has been set by the rules within which an appeal can be filed, yet the Appeal Court can give leave to file at any date.

Rex v. Moore, 17 *C.A.R.* 155.

IN THE SUPREME COURT OF ALBERTA
APPELLATE DIVISION (Summary Trial)

Between:

THE KING,

Respondent,

—and—

.....

Appellant.

NOTICE OF APPEAL

TAKE NOTICE that the above named Appellant....., having been on the.....day of.....A.D. 19....., at....., in the Province of Alberta, convicted by Police Magistrate....., on a summary trial of the offence that he, the said.....did on

or about ..... (*set out the offence of which convicted*) .....
and was thereupon sentenced by the said Police Magistrate .....
on the ..... day of ....., A.D. 19..... , to .....
(*set out the penalty imposed*).

WILL APPEAL to the Appellate Division of the Supreme Court of Alberta, at Edmonton, at the next Sittings thereof or at such other Sittings as may be ordered by the said Court, against the said conviction and the said sentence, upon any and all grounds of appeal which involve questions of Law: AND WILL APPLY for leave to appeal against the said conviction and the said sentence, upon any and all grounds of appeal which involve questions of fact alone, or questions of mixed Law and fact or upon any other ground which appears to the Court of Appeal to be a sufficient ground of appeal, and also upon the following among other grounds:— (*Set out the various grounds of appeal raised.*)

A. T. McLEAN.

SHOULD THE BREACH OF A STATUTE BE MADE SUFFICIENT BASIS FOR A CONVICTION OF MANSLAUGHTER?

The question of criminal liability for death arising from automobiles is constantly before the courts, and to the layman it must appear strange that the answer to such a question as that before the Alberta Court of Appeal in *Rex v. Wilmot* (1) could be so indefinite.

The point raised in the appeal by the Crown is as to whether the act of driving in such a manner as to violate a statutory prohibition is to be treated merely as an aspect of negligence or as a substantive "unlawful act" within the meaning of s. 252 of the Criminal Code (2), where death occurs as a result of such driving.

In the *Wilmot* case the accused was driving while intoxicated, on the left of the centre line of a highway near Calgary, when he struck and killed the deceased who was riding a bicycle in the opposite direction. The trial Judge found the accused not guilty of manslaughter on the ground that the negligence was not sufficiently gross to merit conviction of the crime.

If this case were being decided at common law and not under the Criminal Code, there would be no question of law such as is raised here. For in running down cases, the English courts had early held that a conviction for manslaughter could only be supported by evidence of gross negligence or wanton misconduct showing a disregard for the lives and safety of others (3). The Courts thus set up the standards of conduct to be followed by drivers and decided in each particular case whether there was sufficient evidence of negligence to support a conviction.

With the development of motor vehicles, however, the legislatures began to declare by statute, "that it is not safe in the public interest" (4) to permit a man to drive in a certain manner. Thus driving while in-

(1) (Alta. C.A.) 1940 2 W.W.R. 401. On appeal to S.C. Can. the case was dismissed. At the time of writing formal judgment had not been handed down, but it is understood the reasons do not touch the point of interest.

(2) s. 252—"2. Homicide is culpable when it consists in the killing of any person, either by an unlawful act or by an omission, without lawful excuse, to perform or observe any legal duty, or by both combined . . ." R.S. c. 146, s. 253.

(3) R. v. Timmins 7 C. & P. 499; R. v. Knight 1 Lew. 168.

(4) Stuart J. in R. v. Nickle (Alta. C.A.) 1920 3 W.W.R. at p. 1021.

toxicated became an offence in itself (5), as did the act of driving at a rate in excess of a certain speed, and penalties were provided for the infringement of such laws.

In Canada today if there is no infringement of specific statutory prohibitions and death occurs as a result of an automobile accident, the question of guilt is decided under s. 252 of the Criminal Code, which for the purpose of determining the degree of negligence necessary, was linked up with s. 247 (6) and s. 285 (7). These latter sections deal with control of a dangerous thing, and liability for bodily harm caused by wanton or furious driving, or other wilful misconduct or wilful neglect.

Where, however, the wrongful act consists in the doing of something which is itself punishable by reason of a statute (whether the risk thereby created materializes in harm or not) the question arises as to whether such acts are to be treated merely as phases or aspects of negligence or whether they are acts which automatically involve the crime of manslaughter should death result from them.

The question arose in definite form and was squarely faced in *Rex v. Nickle* (8) where the accused had been driving while intoxicated at a speed greater than 20 miles per hour, both acts being punishable in themselves. The jury at the trial found him not guilty of negligence and acquitted on the charge of manslaughter, but the Crown appealed on the ground that if the jury found the accused guilty of a violation of any statutory prohibition, a verdict of guilty must be found. The Alberta Court of Appeal agreed with this proposition and held that such

(5) Now Criminal Code of Canada s. 285 (4). 1930 c. 11 s. 6. Originally by Provincial statutes, see e.g. S. Alta. 2-3 Geo. V., 1911-12 c. 6, s. 22(2).

(6) s. 247—"Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, or maintains anything whatever which, in the absence of precaution, or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty." R.S. c. 146, s. 247.

(7) s. 285—"Every one is guilty of an indictable offence and liable to two years imprisonment who, having the charge of any carriage or motor vehicle, automobile or other vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person." R.S. c. 146, s. 285.
See R. v. McCarthy (S.C. Can.) 1921 2 W.W.R. 751; R. v. Baker 1929 S.C.R. 354.

(8) (Alta. C.A.) 1920 3 W.W.R. 1016.

violations as were found in the *Nickle* case were unlawful acts within the meaning of s. 252 of the Criminal Code, and where death results, the accused is guilty of manslaughter once a causal connection is found between the wrongful act and the death.

In general however convictions for manslaughter were based on negligence which in itself showed wanton misconduct or recklessness amounting to complete indifference to consequences (9) and if the problem here raised were introduced it was avoided, judgment being based either on the facts of the particular case or another point of law (10).

Doubt of the soundness of the decision in *Rex v. Nickle* may arise however from s. 951 (3) of the Criminal Code (11) which now states that upon a charge of manslaughter arising out of the operation of a motor vehicle, the jury, if they are satisfied that the accused is not guilty of manslaughter but is guilty of reckless driving under 285 (6) (12), may find him guilty of the latter offence.

It is submitted that if the accused is driving recklessly so as to be of danger to the public, he is doing an unlawful act, and if *Rex v. Nickle* is followed, would be guilty of manslaughter if death ensues. But Parliament has expressly stated that this need not necessarily be so.

The question of a similarly worded statute (13) came before the House of Lords in *Andrews v. Director of Prosecutions* (14). It was

(9) R. v. Baker 1929 S.C.R. 354; R. v. Coupeland (Alta. Trial) 1930 3 W.W.R. 410.

(10) See e.g. R. v. Constable (Alta. C.A.) 1936 2 W.W.R. 273, in which McGillivray J.A. and Howson J.A. presume R. v. Nickle sound for purposes of argument but make their decision on the facts. See also, Rex v. Dolynchuk (Man. C.A.) 1934 1 W.W.R. 200; R. v. Jackson 1937 1 D.L.R. 32 and R. v. Costello 1932 O.R. 213.

(11) "Upon a charge of manslaughter arising out of the operations of a motor vehicle the jury, if they are satisfied that the accused is not guilty of manslaughter but is guilty of an offence under subsection six of section two hundred and eighty-five may find him guilty of that offence, and such conviction shall be a bar to further prosecution for any offence arising out of the same facts." 2 Geo. VI 1938 S.C. c. 44 s. 45.

(12) "Every one who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence and liable . . ." 2 Geo. VI 1938 S.C. c. 44 s. 16.

(13) Road Traffic Act 1930 (20 and 21 Geo. V c. 43) s. 34.

(14) 1937 A.C. 576.

held then, that if death is caused in the course of doing an unlawful act, namely, driving a car in such a manner that (if death had not occurred) a conviction could have been obtained for an offence under s. 11 of the Road Traffic Act, 1930 (15), the accused is not *ex necessitate* guilty of manslaughter. This decision must be taken to overrule an earlier decision of the Court of Criminal Appeal (16) which approved the charge to the jury as given by Macnaghten J. defining negligence in the words of s. 11 previously mentioned, which creates the offence of dangerous driving.

The *Andrews* case is not entirely satisfactory in that it does not clarify the problem as to the degree of negligence which must necessarily be established to sustain a manslaughter conviction (17), but it does indicate that a higher degree of negligence is necessary for the crime of manslaughter than for an ordinary offence under the law pertaining to motor vehicles.

The general principles of *Andrews v. Director* have been followed by Canadian courts (18) but it was not until the case of *R. v. Wilmot* that the effect of it on *Rex v. Nickle* was directly considered.

Since the members of the Alberta Court of Appeal (Chief Justice Harvey, Mr. Justice Ford and Mr. Justice McGillivray) did not agree as to the reason for judgment in the *Wilmot* case, it is interesting to note briefly their respective lines of thought.

The Chief Justice in a dissenting judgment upholding *R. v. Nickle* (in which he had concurred with Stuart J.) said that the law as laid down in *Andrews v. Director* did not apply, in that the latter case was dealing only with the question of negligence while the *Nickle* case, as well as the case at bar, dealt with something which was absolutely unlawful without any degrees or conditions.

But as already noted above, the unlawful act in the *Andrews* case was something that was prohibited by statute and punishable whether or not

(15) Similar to s. 285(6) of the Canadian Criminal Code creating the offence of reckless or dangerous driving.

(16) Rex v. Leach 1937 1 All Eng. Reports 319.

(17) See Patrick Dean, "Manslaughter and Dangerous Driving" (1937) 53 Law Quarterly Review p. 380.

(18) Rex v. Carr 1937 3 D.L.R. 537; Rex v. Bowman (Ont. C.A.) 1939 3 D.L.R. 551; and semble Rex v. Aumuller (Sask. C.A.) 1938 2 W.W.R. 244.

death occurred (19). Further as McGillivray J. A. points out in his judgment the act of driving while intoxicated was not unlawful *per se* until it was so declared by the Legislature or Parliament (20). It is however true that England has no code provision similar to s. 252, although it is extremely doubtful if that code provision should be interpreted so as to make such a startling alteration to the common law.

In turning to the judgment of Ford J.A., it is interesting to note that his interpretation of *R. v. Nickle* is unlike that found elsewhere (21). He believes that the unlawful acts discussed in that case are there treated as aspects or phases of negligence and that in view of *Andrews v. Director, Rex v. Bateman* (22) and *Rex v. Baker* (23) the treatment of negligence must now be reconsidered. Mr. Justice Ford also stated, "If this is not the proper view of the decision, if it were open to me to do so, I would with great respect differ from it" (24).

However, having stated his view of the *Nickle* case, Mr. Justice Ford continues by discussing causal relationship and reasonable doubt, holding that it was possible for the trial judge to find that the evidence fell short of establishing that the driving of the motor car by the accused while intoxicated was a real contributing cause of the killing of the deceased. It is nowhere doubted that a causal connection must be found between the negligence or the unlawful act and the death (25).

Mr. Justice Ford's judgment does not deal directly with the problem of the relationship between statutory breach and manslaughter but his view that a greater degree of negligence must now be established than that

(19) Rex v. Bowman (Ont. C.A.) 1939 3 D.L.R. 551; 1939 O.L.R. 421. The case also states that there may be a conviction under s. 285(6) even though the negligence is not sufficient to establish manslaughter if death had ensued.

(20) Rex v. Wilmot 1940 2 W.W.R. at 429.

(21) Unless perhaps a similar interpretation of the Nickle case could explain the statement of Robson J.A. (Man.) in Rex v. Dolynchuk 1934 1 W.W.R. at 222: "I do not think the learned judges who heard the appeal in Rex v. Costello 1932 O.R. 213 can be said to have necessarily disagreed with Rex v. Nickle."

(22) (1925) 19 Cr. App. R. 8.

(23) 1929 S.C.R. 354.

(24) Rex v. Wilmot 1940 2 W.W.R. at p. 417.

(25) Rex v. Fenton (1830) 168 E.R. 1004; Reg. v. Towers (1874) 12 Cox C.C. 530; Rex v. Wilmot 1930 1 D.L.R. 778. See also Russell on Crimes 7 Ed. p. 807. But see Stuart J.A. in Rex v. Nickle 1920 3 W.W.R. at p. 1021.

shown in the *Nickle* case demonstrates that his opinion is that mere breach of a statute is not a sufficient basis for a conviction of manslaughter.

The third judgment handed down, that of McGillivray J.A., meets the point directly and it is hoped that the expression of the law as found there is the correct one. Following the *Andrews* case, he takes the view that it does not follow that because one is driving in violation of a statutory prohibition, and hence is doing an unlawful act, that the killing of another man must lead to a conviction for manslaughter.

In view of s. 951 of the Criminal Code, and in view of *Andrews v. Director of Prosecutions,* it would seem strange to decide otherwise. It seems impossible to draw a valid distinction between the wrongful act of driving recklessly and in a manner that is dangerous to the public, and the unlawful act of driving a motor vehicle while intoxicated, or driving to the left of the centre line of a highway, when liability for manslaughter is being considered.

The general principles that a higher degree of negligence is necessary for criminal than for civil liability should not be disregarded merely because a statute says certain acts are not in the interest of public safety. Such enactments may be guides in determining the degree of negligence, but to treat them as more than that, as absolute unlawful acts within the meaning of s. 252, seems to go too far. As is noted by McGillivray J.A., "it seems to me absurd that a man may be found guilty or not guilty of manslaughter according to what is in his stomach at the moment of the accidental killing, and in my view the position is not changed because the excessive use of any food or drink in certain circumstances is prohibited by statute" (26).

The problem of the degree of negligence which must necessarily be established to sustain a conviction for manslaughter, if a breach of a statute is to be treated merely as a phase or aspect of negligence, has been discussed in several recent cases (27). The result of the decisions in *Andrews v. Director,* and *Rex v. Bateman,* seems to be that there are three distinct degrees of negligence recognized (28). It has long been

(26) 1940 2 W.W.R. at p. 428.

(27) Rex v. Giardine (1939 Ont. C.A.) 71 C.C.C. 295; Rex v. Carr (Ont. C.A.) 1937 3 D.L.R. 537; Rex v. Preusantanz (Man. C.A.) 1936 1 W.W.R. 520.

(28) See Rowell C.J.O. in Rex v. Carr 1937 3 D.L.R. at 541.

established that negligence which will give rise to civil liability may be much less than that giving rise to criminal liability (29). Only more recently however has a definite distinction been expressed as to degrees of criminal negligence. To establish the crime of manslaughter the highest degree of negligence must be proven. This has been described often as gross negligence. The third degree of negligence lies somewhere between the two already noted and is that degree of negligence which is indicated by Parliament when it permits a conviction under s. 285 (6) of the Criminal Code in lieu of a manslaughter conviction. For there may be driving which could not be described as grossly negligent, but which was something greater than that giving rise to merely civil liability.

The borderline between these three degrees of negligence is vague and undeterminable, but surely the mere creation of offences by Parliament or the Provincial legislature, does not change or modify the principles on which a conviction for manslaughter should be based.

F. M. Pritchard.

(29) Note that what seems to be authority for the converse of this in Rex v. McCarthy (S.C. Can.) 1921 2 W.W.R. 753, is explained in Rex v. Baker 1929 S.C.R. 354.

Re WRIGHT ESTATE—1937 3 *W.W.R.* 452 (Sask. Trial)

The testator had lived in England with his wife, daughter and son. He came to Canada in 1910 leaving his family in England. For two years he corresponded with them and then ceased all contact. His son died prior to 1913.

Two days before his death the testator executed a holograph will in the following words:

To C. Burrows:

"Although of sound mind to-day, I am a sick man, and in case the Grim Reaper catches up with me, I wish to leave everything I own . . . to Marion Honeysett . . . She is to have everything as I have no living relatives."

Signed: FRANK WRIGHT.

The testator had shortly before his death, in a conversation with his landlady, stated that he had a wife living but that she was no wife to him as she had left him for another man. At the time of the testator's death his wife and daughter were both living in England.

The learned Judge refused probate of the will on the ground that it was conditional on the testator having no relatives at the time of the execution of the document.

The case furnishes a novel application of the doctrine of dependent relative revocation. This doctrine has furnished relief in cases in which a testator (by act to the document (1), or by subsequent instrument (2)), has revoked a gift assigning as his reason for such revocation an erroneous assumption of fact. Under the doctrine the effectiveness of the revocation is made dependent or conditional upon the truth of the fact assumed.

There is apparently no authority apart from the principal case for the application of this doctrine to the execution of a will under an erroneous assumption. The court of Probate has long exercised power to strike out words inserted by mistake and which the Testator had not intended to form part of the will (3), but *In re Wright* would not yield to that

(1) Adams v. Southerenden.

(2) Campbell v. French, 3 Ves. 321; and see generally Theobald on Wills, 7th ed., 750; Jarman on Wills, 7th ed., 175. For a discriminating analysis see Warren, "Dependent Relative Revocation" (1920), 33 Harv. L. Rev. 337.

(3) For the Principles governing the exercise of this power, see Guardhouse v. Blackburn (1866) L.R. 1 P. & D. 109.

technique because the will reads exactly as the testator intended it to read. Nor do conditional wills furnish a close analogy. In those cases the will is expressly made conditional upon the Testator's death under specified circumstances and the court is merely giving effect to his words. The same is true in the case of gifts upon express condition precedent or subsequent.

There is in the cases a good deal of language which rests the doctrine of dependent relative revocation upon an implied condition (4). It is fairly obvious, however, that the condition found in the typical case of dependent relative revocation is a purely artificial construction and that the court of probate is giving relief in the case of a mistake. If it can do that in the case of a revocation made under a mistake, there seems to be no compelling reason why it cannot treat the case of a will executed under a mistaken assumption of fact in the same fashion.

A peculiar feature of the principal case is that the evidence indicated that the testator labored under no mistake at all. He knew his wife and daughter were probably alive, but he did not desire them to take his property after his death. Under such circumstances it would be difficult to treat the will as being conditional upon their being already dead or as executed under mistake, and such relief as the widow obtained should have been granted under the provisions of the Widow's Relief Act (5).

Hugh John Macdonald.

(4) See Adams v. Southerenden, L.R. 1925 P.D., 177 at 185; In re Faris 1911 1 I.L.R. (Ch.D.) 469 at 472; but see In Re Churchill 1917 1 Ch.D. 206 at p. 210.

(5) R.S.S. 1930 C. 61.

BOOK REVIEWS

I.

LOS MODOS DE INCIACION DEL CONTRALOR JUDICIAL DE LA CONSTITUCIONALIDAD DE LAS LEYES EN LOS ESTADOS UNIDOS—By George H. Jaffin.

II.

LOS MODOS DE INCIACION DEL CONTRALOR JUDICIAL DE LA CONSTITUCIONALIDAD DE LAS LEYES EN LA REPUBLICA ARGENTINA—By Roberto Pecach.

Ediciones de la Revista Universitaria "Juridicas y Sociales," Buenos Aires, 1939. P. 45.

Mr. Jaffin after some introductory remarks to the effect that Continental lawyers have great difficulty in believing that the judiciary in the United States exercises the power to nullify legislative enactments, traces the expansion of the procedural methods by means of which the American Federal courts become seized of the question of the constitutionality of State or Congressional legislation.

These are listed and discussed in the order of their development, (1) the exception or defence of unconstitutionality, (2) the injunction restraining the executive officer from enforcing the unconstitutional enactment, (3) the declaratory judgment.

A good portion of the study is concerned with the slow rise of the last method upon which the Supreme Court has been reluctant to embark. This reluctance has various causes, deeply embedded in conceptions of the proper function of the judiciary. Mr. Jaffin favors an extensive use of the declaratory judgment, arguing that all decisions on questions of constitutionality are in their real significance declaratory judgments; that the public interest is in any particular controversy of much greater import than the private rights of the individual litigant; and that the other methods are really procedural pretences to accomplish the purpose of obtaining the declaratory judgment. No doubt many of Mr. Jaffin's points are well taken—and yet—there is real danger in blurring the traditional emphasis that constitutional limitations protect the individual against the ever encroaching state. From another point of view, since many questions of constitutionality are in their last analysis questions of reasonableness under the circumstances possibly the slower methods of bringing cases to court

have in addition to the value of the impact of the concrete instance the value of the results of interim experimentation before the question is answered. These remarks indicating some lack of complete enthusiasm for wider use of more direct references of constitutional questions are offered with the knowledge that these values are obtained at a price, and that the concrete instance offers splendid opportunities for distortion.

Mr. Jaffin's study is well integrated and presents a neatly executed outline of the evolution of judicial control over legislation in the United States of America.

II.

This is an interesting statement of general constitutional theory generalalized from the Argentine constitution, which sets up a representative republican form of government for the fourteen members states (provinces) of the Argentinian Union. The organic law of the Argentine Republic was as silent as its American source in its provisions for judicial control of legislative activity. Nevertheless the federal Supreme Court aided by some meagre enactments of the federal legislature (and as Dr. Pecach demonstrates the inherent necessities of the nature of a federal union) worked out a body of constitutional law designed to preserve the Union by keeping each member state within its assigned domain—and at the same time designed to secure the retained local autonomy against encroachments by the new central authority which was created by the union of the member states.

In the latter part of the study Dr. Pecach discusses in some detail the methods by which a litigant can raise the question of unconstitutionality. These are narrowly defined and consist mainly of what he describes as the action and defence of unconstitutionality, supplemented by the *recurso extraordinario* (which appears to be merely a method of transferring a case from the supreme court of a province to the federal supreme court on the ground of a constitutional issue). The second and third methods discussed by Mr. Jaffin are unknown to Argentine practice, although to Dr. Pecach this is a source of regret.

Canada, too, is a federal union with a judiciary exercising the function of keeping the provincial legislatures and the federal parliament within their assigned powers. Its organic law was preceded by constitutional conferences, but is embodied in Acts of the Imperial Parliament which put in the form of law the agreements reached by the representatives of the

colonies which desired to form a Federal Union. Questions of constitutionality may be raised at any stage of any matter or cause coming before any court.. There are procedural restrictions requiring that in the case of provincial legislation the attorney general for the province must be notified in order that he may appear in the proceedings to defend the Act. In the case of a federal statute the Attorney General for Canada must be notified for the same purpose. We have also injunctive relief or the question of constitutionality may be raised by an action seeking a declaratory judgment (Se Home Oil Distributing Ltd. v. Atty.-General of British Columbia, 1940 S.C.R. 444 (1939 S.C.R.). Or the question may be raised, as it often is, on Habeas Corpus proceedings. And the Lieutenant-Governor in Council or the Governor General in Council may submit to the courts any statute or proposed statute for an advisory opinion. These opinions though not judgments are generally cited as authoritative, and such cases take the regular course of appeals from the Supreme Court to the Judicial Committee of the Privy Council sitting in London.

M. M. M.

JEREMY BENTHAM (1748-1832)

"Character is Destiny," said Heraclitus; Jeremy Bentham proved it so. In the London where his father and his father's father before him had achieved success as attorneys; Bentham was by his own act to end his promising law career and by so doing, to open the doorway to greater achievements than his ambitious father ever knew.

The early years of his life are a study in the development of the scholar and the analyst. From a precocious child whose reading ran the gamut of literature, from Plutarch's "Lives" to "Clarissa Harlowe," the boy became ever more of the student, more and more engrossed in what seemed to him the deeper things of life, more and more critical of the superficialities he found. Little as he liked public school, it was less he found to admire in Oxford, from which he carried only memories he afterwards embalmed in bitter charges of "mendacity and insincerity." When he was called to the bar, he found one or two cases from his father's friends. As he himself wrote, "On my being called to the bar I found a cause or two at nurse for me. My first thought was how to put them to death, and the endeavors were not, I believe, altogether without success." To the intense mortification of his father, and the complete satisfaction of himself, he effectively ended his law career by advising his client that the suit would be better put an end to, and the money which would be wasted in the contest, saved.

Yet the closing of that career was the opening of a greater. Now it was that he began his search for the ultimate principles of human welfare, and found at last his great creed in the doctrine of legislative utilitarianism. Bentham conceived that the proper aim of the lawmaker was to promote human happiness, the greatest possible happiness for the greatest possible number. Few there are who would dispute that major premise. But happiness like truth has many facets. Bentham saw this, perhaps, more clearly than anyone before or since his time. Contemptuous though he was of much that mankind had achieved he paid to the individual profound respect, in that he granted that each of us is the best judge of his own happiness. From this he reasoned that the lawmaker ought to restrict freedom only when it was clear that such restriction would increase the sum total of human freedom.

Bentham's central thesis was mechanically pushed to unreasonable lengths by Herbert Spencer; and extreme forms of *laissez faire* economics

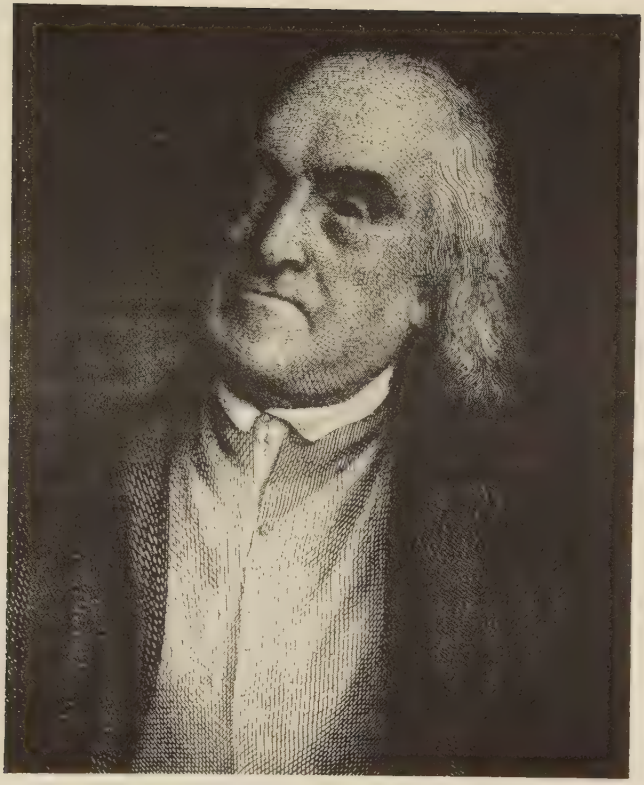
permitted an abstract conception of freedom to lead to a good deal of actual tyranny. And now reactions against abuses of Bentham's central thesis proceed apace, but like so many reactions, in utter disregard of the great philosophical discovery he gave the world. Present day social philosophers would be astounded if they accidentally stumbled upon and read Bentham, even as some of us are astounded by the policies they advocate because they have not taken the trouble to read him.

Bentham carried forward in the sphere of legislation the process of making the law rational by means of judicial decision which owes so much to Lord Mansfield (see 1 A.L.Q. 41). Each was a genius in his own field and our debt to them is great. Today the law has grown to such bulk that an innovator even of Mansfield's stature is not what we need. But we do need another Bentham, both to recall some aspects of 19th century liberalism and to clear away much tangled underbrush.

Lord Brougham, who carried many of Bentham's recommendations through Parliament, paid him fitting tribute in these words:

"The age of law reform and the age of Jeremy Bentham are one and the same. . . . Not only was he thus eminently original among the lawyers and legal philosophers of his own country; he might be said to be the first legal philosopher that had appeared in the world."

MARGUERITE RITCHIE.



Jeremy Bentham (1748-1832)

NOTES FOR STUDENTS REGARDING THE TAXATION OF SUCCESSION DUTIES

These notes are written in the hope that they may be of some benefit to Law Students, and deal with the mathematical rather than with the legal aspects of the problem. In the great majority of cases the computation of the amount of duty payable is a fairly simple matter, and it is with such cases that these notes will mainly deal.

Broadly speaking, the Alberta Succession Duty Act, Chap. 17, Statutes of Alberta, 1934, with amendments up to 1938, deals with and imposes a tax on property situate in the Province and owned by the deceased at his death, whether the deceased was resident or domiciled within the Province or not (Sec. 9); and with personal property situate outside the Province passing to a beneficiary domiciled or resident within the Province, where the deceased had a domicile within the Province at his death (Sec. 12). It will thus been seen that a parcel of realty in this Province, owned by the deceased, who was domiciled in England, and devised to a person domiciled in Scotland, would be subject to Succession Duty here; as well as a bank account in Ontario, where the deceased was domiciled and the beneficiary was domiciled or resided in this Province. The Act also provides for the taxation of the proceeds of accident or life insurance policies received within the Province, where the deceased and the beneficiary were resident or domiciled in the Province at the date of death (Sec. 15); for property of the deceased voluntarily transferred in contemplation of death (Sec. 5A); and for gifts *inter vivos* or property taken as a *donatio mortis causa* within ten years of the date of death (1937, C. 17, S. 2). Section 5 lists further property which is deemed to be property passing on the death of the deceased, and includes annuities or other interests provided by the deceased to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased, and property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cessor of that interest.

Estates are taxed on the basis of information set out in the Affidavit of Value and Relationship and in two inventories, A and B (See Schedule to Succession Duty Act—form 1). The affidavit of value and relationship is, as its name implies, an affidavit completed by the executor or administrator (generally prepared by the solicitor) of the deceased's

estate, and is to the effect that inventories A and B, which form part of the Affidavit, disclose all the property owned by the deceased at the date of his death, any gifts *inter vivos* or transfers by way of *donatio mortis causa* made by the deceased within ten years of his death, insurance moneys, and so forth; as well as the names and relationship of the persons to whom the property will pass. In Inventory A are listed the assets and debts of the estate. As will be seen from the Act, this inventory makes provision for listing the various assets of the estate, for giving their description, location and value. In listing real estate it is necessary to give the legal description together with the full value of the parcel, as well as to describe separately improvements to real estate, mines, minerals and the value of each. The fixing of a value on real estate frequently causes difficulty because of the fact that the market value as at the date of death is not necessarily the value taken for Succession Duty purposes in Alberta. The value of realty for Succession Duty purposes, assuming a willing buyer and a willing seller, takes into account not only the market value, but also past, present and future considerations; so that during a land boom the value for Succession Duty purposes might be lower, and during a depression period, higher than the prevailing market price. Inventory B is for the purpose of setting out the names of the beneficiaries or persons entitled to the property under intestacy; their domicile, residence, age, relationship to the deceased, the property passing to each one, and its value. If there is a will, a copy should be attached to this inventory. In cases where the great bulk of the deceased's property was situated in another jurisdiction and Succession Duty was collected there, it is usual to submit a certified copy of that inventory and list in Inventory A only the property situate in Alberta.

The rate of taxation is based upon the net valuation of all the property, wherever situate, owned by the deceased at the date of his death, and this is so even though only a small portion of the property may be situate in Alberta. For example, where a deceased and all the beneficiaries under his will are domiciled in England, and the sole taxable property, in so far as Alberta is concerned, consists of a parcel of realty in this Province, the rate of taxation would be based on the net value of the whole estate; that is, if the estate amounted in value to $101,000.00, and the Alberta property was valued at $100, the rate of taxation applicable to the $100 would be that for estates exceeding $100,000 in Table A. The net value of all property also includes exemptions allowed by the Act. Section 7 states

that property bequeathed or devised for religious, charitable or educational purposes within the Province, and not exceeding in value the sum of $2,000 for any one purpose, or to the University of Alberta, or insurance moneys specifically earmarked for payment of Succession Duties to the amount of the duty levied, shall be exempt from taxation, but even though such bequests are exempt from taxation, they nevertheless are included in the net value of all property, and it is upon this figure that the rate of taxation is based.

The net valuation figure is arrived at by subtracting from the aggregate valuation of all property the debts of the estate, but Section 6 discloses that only certain debts are allowed. Funeral expenses are an allowable deduction, but they must be reasonable and not exceed $400; similarly the expenses of procuring probate or letters of administration are allowed, but such expenses must not include solicitor's fees. Succession duty levied and paid in another jurisdiction on the property of the deceased is not an allowable deduction in Alberta, and this is so even where the same property is taxed by two different jurisdictions, provided that there is no reciprocal arrangement between the jurisdictions (See Sec. 40). Reciprocal arrangements have been made with certain Provinces by Orders in Council 586-30 and 504-37, and where property locally situate without the Province and subject to Succession Duty here has been taxed by one of these jurisdictions and the tax paid there, an allowance will be made by this Province upon application being made. Succession Duty is due and payable at the death of the deceased, but if paid within six months of the date of death, no interest will be charged. If the duty is not paid until after the expiration of six months, it is subject to interest at 6% per annum from the date of death until paid (Sec. 32).

In determining the value to be placed on stocks, shares and bonds, the quoted market selling price as at the date of death is taken if the stocks and bonds are quoted on a stock exchange; and where there is no quotation available on that particular day, the quotation given at the date nearest the date of death is usually taken. No allowance is made for the fact that the deceased may have been the owner of a large block of shares which, if placed on the market, would depress the price. In the case of unquoted shares, in coal mines, for example, a value may be fixed on examining the balance sheets and financial statements of the company (Sec. 26). This procedure may be resorted to whenever the shares are unquoted

and the value declared in the affidavit appears to be low. Assets in foreign jurisdictions expressed in foreign money are converted into Canadian funds at the quoted rate in Montreal as at the date of death. In deducting debts charged against specific legacies or against stated funds, the directions in the will are generally followed (Sec. 6, ss. 2).

While the rate of taxation is based upon the net valuation of all property wherever situate, owned by the deceased at the date of his death, it varies in accordance with the degree of relationship between the deceased and the beneficiary (See Table A). For example, assuming that a testator died domiciled in Alberta leaving property, all in Alberta, the net value of which was $11,000, it will be seen, on examining the first column of Table A, that the rate applicable would be that for estates which exceed $10,000 and do not exceed $15,000. If the sole beneficiary were the widow, who was a resident of the Province, the estate would be exempt from taxation, in accordance with the rate in the second column. If, however, the widow were resident outside the Province, the column applicable would be the third one, and the rate would be 1%. By an amendment to the Act, made in 1938 (Chap. 18, s. 2), a further duty by way of a surcharge of 20% of the amount of the duty was added, hence the tax would thus amount to $11,000 at 1% or $110, plus $110 at 20% or $22 making a total of $132. If, for example, the testator had bequeathed a cash legacy of $1,000 to a brother "or any lineal ancestor," and the residue to the widow, resident outside Alberta; the rate of taxation applicable to the brother's legacy would be that in the fourth column, and the tax would be $1,000 at 5½% or $55 plus $10,000 at 1% or $100, making a total tax of $155; plus 20% of $155 or $31=$186. Again, if the testator had bequeathed a cash legacy of $1,000 to a stranger in blood —a friend, let us say; $1,000 to a brother and the residue to the widow, resident outside Alberta, the taxation would be—for the stranger in blood, $1,000 at 11% or $110 (Col. 5), plus $1,000 at 5½% or $55 (Column 4), plus $9,000 at 1% (Column 3), making a tax of $255, plus 20% of $255=$51, or a total tax of $306. Upon examining Table A in the Succession Duty Act it will be seen that where the deceased was domiciled in Alberta and all the beneficiaries are residents of the Province and are direct descendants of the deceased, that is, the grandfather, grandmother, father, mother, husband, wife, child, grandchild, son-in-law, or daughter-in-law, the estate does not become taxable until the net value exceeds $15,000. When the net value exceeds $15,000 and does not exceed $20,000

the rate of taxation for direct descendants resident in the Province would be that under the second column, that is, "1% plus 10/100 of 1% for each full $1,000 by which net value of property of deceased exceeds $15,000." For example, if the estate amounted to $18,001.00, the rate would be 1% plus 3×10/100 of 1% or 1.3% and the duty would be $18,001.00 at 1.3% or $234.01 plus 20% of $2341.01=$46.80, making the total duty $280.81. Table B provides for additional duty where the property passing to any beneficiary exceeds $25,000. If, for example, a testator died domiciled in Alberta and bequeathed his entire estate, the net value of which was $300,001.00, to his daughter, a resident of Alberta, the rate of taxation would be 8% under the second column of Table A, plus 3½% under the second column of Table B, or a tax of $300,001.00 at 11½% or $34,500.12, plus the 20% surcharge equalling $6,900.02, making a total tax of $41,400.14. It should be noted that the additional tax levied under Table B applies only to the property passing to a beneficiary and does not operate until the share of a beneficiary exceeds $25,000, so that, in the above example, had there been a cash legacy of $1,000 to a brother, and the residue to the daughter, the cash legacy would not be subject to the additional duty but would be taxable under the fourth column of Table A only—that is, $1,000 at 14%, plus $299,001.00 at 8% plus 3% or 11%; the 20% surcharge to be added in both cases, of course. The rate under Table B is now 3% rather than 3½% in the first part of the example, because now the share of the daughter is between $200,000 and $300,000, and not exceeding $300,000.

While the above type of estate, where the deceased died domiciled in the Province and all the property owned by him at his death was taxable, is quite common, it is frequently found that either the deceased was domiciled outside the Province, or that part only of the property is taxable, and in such cases debts and legacies must be apportioned between the taxable and the non-taxable property (Sec. 8). Let us assume that the deceased was domiciled in England, that the net valuation of all the property was $51,000, that the sole taxable property is a parcel of realty in Alberta valued at $1,000, and that the beneficiaries are a brother as to a cash legacy of $5,000, and the widow, resident outside Alberta, as to the residue. In this case the property in the Province bears none of the debts of the estate, since we assume that there were no debts charged specifically against the Alberta property or payable to persons resident in Alberta, and in such a case, and provided further that the property situate outside Alberta is

sufficient to pay all the debts of the estate, then no allowance is made in determining the dutiable value of the property situate within the Province for debts or encumbrances to persons resident without the Province (See Sec. 8, ss. e). The method of distributing the taxable property as between the widow and the brother is to take the proportion which the cash legacy bears to the net estate (5000/51000) of the taxable property, that is, the brother's share of the taxable property would be 5000/51000 of $1,000 or $98.04. The widow's share of the taxable property would be her share of the entire estate divided by the entire estate 46000/51000 of the taxable property ($1,000) or $901.96. Hence the duty would be $98.04 at 9.4% or $9.22, plus $901.96 at 4.4% (no additional tax under Table B) or $39.69, making the total tax $48.91 plus 20%, or $58.69. If, for example, in addition to the cash legacy of $5,000 and the bequest of the residue to the widow, there had been a specific devise to a sister of real property situate in England and valued at $5,000, then the proportion would be changed to the extent of this $5,000, in that the amount available for the proportion would be reduced from $51,000 to $46,000. The proportion would now be, in the case of the brother 5000/46000 of $1,000, and in the case of the widow 41000/46000 of $1,000. The rates of taxation would not be affected since the specific devise, though not taxable, is still part of the net valuation of all property, and it is this figure on which the rate is based.

We now turn to the problem of life interests, annuities and the method used in taxing these interests. A common type of estate is where the entire property is left to the widow as a life interest and, on her death, to the children of the testator. The aim of the Act is to tax property passing on the death of the testator, but the effect of such a will is to give the widow an annuity for life and the children the remainder at a future date. It therefore becomes necessary to find the present value of this annuity and it is this sum which is taxed in the case of the widow. By Section 30 of the Act the rate of yield for the purpose of computing the present value of an annuity is fixed at 5%. This Section also provides for a mortality or expectation of life table, which is set out at the end of these notes. Having found the present value of the widow's life interest, there remains the problem of taxing the remainder. By Section 34 the beneficiaries are given the choice of waiting until the remainder comes into possession on the death of the widow, and then paying the duty on the full amount, or they may, and this is the usual course, commute the duty

payable on this interest at 5% and pay the duty within 6 months of the date of death. Let us see how this works out in a hypothetical case. The testator died domiciled in Alberta, the net valuation of all property is $31,000 and the will bequeathes the entire estate to the widow, resident in Alberta, aged 78 as at the date of death. On the death of the widow the property passes to the son, also resident in Alberta. All the property is taxable. The present value of the widow's shares, at age 78, is seen to be $\frac{5.352858}{20} \times \$31{,}000.00 = \$8{,}296.93$, and her expectation of life is 6.39 years. The figure 5.352858 represents the value of an annuity of $1 for 6.39 years, and the figure 20—5%. The remainder will be the present value, at 5%, of $31,000 in 6.39 years or $22,703.07; that is, $31,000 less $8,296.93. The taxation in the case of the widow's share will be $8,296.93 at 2.24% (Col. 2, Table A) or $185.85, plus 20% or $223.02. If the son preferred to pay the duty when the expectancy fell into possession, the duty would be levied on the full $31,000 on the death of the widow. If, instead of bequeathing a life interest in the estate to the widow, the testator had directed that she be paid an annuity of $100 per month, the present value of this annuity could be found by finding the sum which, at 5% would produce such an annuity, and finding the present value as above described, or the present value of the annuity can be computed according to the following formula: $\$100 \times \frac{(1-1.05)^{-6.39}}{(1.05)^{1/12}-1}$ = the present value of an annuity of $100 per month for 6.39 years. To be accurate, however, this latter method requires the use of ten place logarithm tables.

Further complications are encountered when, for example, the widow is given a life interest in the entire estate, but part only of the estate is taxable. In such cases the present value of the life interest in the entire estate is calculated; and then the present value of the widow's life interest, and the reversion commuted for present payment are apportioned out of the taxable property in the manner previously described.

Another fairly common type of estate is where, after specific bequests, one half of the residue is bequeathed as a life interest to A, a sister, age 78, and one half of the residue as a life interest to B, a sister, age 80. On the death of B, her life interest accrues to A, and on the death of A, the residue passes to X, a charitable organization. The will would not be phrased in this way, of course; it would bequeath a life interest in one

half of the residue to each of the sisters, and on the death of one, her share to go to the survivor; but for the purposes of taxation we must assume that the older sister will predecease the younger sister by exactly the difference in their expectation of life according to the mortality tables. Let us assume that the net valuation of all property is $124,792.37 and that the specific bequests to a brother amount to $2,110.00. Then the net valuation of all property less specific bequests will equal $122,682.37. The present value of A's one half of the residue, at age 78, will be

$$\frac{5.352858}{20} \times \frac{\$122,682.37}{2}$$

or $16,417.53; and the present value of B's one half share

$$\frac{4.844465}{20} \times \frac{\$122,682.37}{2}$$

or $14,857.66. But on B's death her life interest in one half of the residue will accrue to A, and so A's share will be $16,417.53 plus ($16,417.53 less $14,857.66) or $1,557.87, which equals $17,977.40. On A's death the remainder passes to the X charity and this sum, commuted for A's expectation of life—6.39 years at 5%—will equal $122,582.37 less $16,417.53 plus $17,977.40) or $88,287.44. Assuming that all the property is taxable and that the X charity is located outside the Province, the taxation would, on the basis of the net valuation of all property being $124,792.37, be as follows:

Specific bequest to Brother— $2,110.00 at 11.48% (Col. 4) = $242.23 plus 20%	=	$ 290.68
Present value of A's life interest— $17,977.40 at 11.48% (Col. 4) = $2,063.81 plus 20%	=	2,476.57
Present value of B's life interest— $14,857.66 at 11.48% (Col. 4) = $1,705.66 plus 20%	=	2,046.79
X Charity—$122,682.37 commuted for 6.39 years at 5% or $88,287.44 at (17.96% plus 2½%) (Table B) = 20.46% (Col. 5) = $18,063.41 plus 20% surcharge	=	21,676.09
The total duty would thus be		$26,490.13

While estates of a more complicated nature do occur, it is hardly thought necessary to deal with them here.

Where a testator has specifically earmarked life insurance policies for the payment of Succession Duty, Section 7(e) provides that the proceeds shall be exempt from taxation, except as to any excess of these moneys over the amount of the duty. Such a situation is dealt with in the following

manner:—Let us assume that the net taxable property amounts to $98,745.95 and that included in this figure is a life insurance policy, earmarked for payment of Succession Duty, in the amount of $6,000. Assuming that the rate of taxation is 4.92%, and that the surcharge of 20% must be added, the proportion exempt from duty can be found by the following formula:

$$\frac{100}{100+(4.92\times 6/5)}\times \$98,745.95$$

or, simplifying—

$$\frac{100}{105.904}\times\frac{\$98,745.95}{1}=\$93,241.00$$

It will be seen that the portion exempt from duty equals $5,504.95, and that the total duty payable is $93,241.00 at 4.92% or $4,587.46.

Until the duty levied by the Succession Duty Branch is paid, or a satisfactory deposit arranged, it is impossible to transfer any land, withdraw money from bank accounts in the name of the deceased, or receive the proceeds of insurance policies. Orders in Council also prevent the executor or beneficiaries from gaining access to safety deposit boxes in the name of the deceased without the consent of the Collector of Succession Duties or other authorized officials. A copy of the regulations regarding the opening of safety deposit boxes, together with the required forms, is included in the 1938 Office Consolidation of the Succession Duty Act. These regulations were published as Orders in Council 801-34; 351-35 and 1100-35. When the duty is paid or a satisfactory deposit made, a certificate of discharge is issued releasing realty owned by the deceased and enabling the executor to transfer title (Sec. 37). The cost of this certificate is $1 per page. In a similar manner Banks and Insurance Companies are given releases, for which no fee is charged, however. Sections 59 *et seq.* lays down prohibitions and penalties for any unlawful dealing with the property. The schedule of Examination Fees is also set out at the end of these notes. These fees are charged for examining the Affidavit of Value and Relationship, and should be included when the documents are sent to the Succession Duty Branch.

These notes do not, nor are they intended to cover the whole field of Succession Duties Taxation in this Province. If they are found to be of some benefit to students, their purpose is well served.

J. M. Good.

APPENDIX

SCHEDULE OF EXAMINATION FEES

Where the net value of estate	Fee
does not exceed $3,000	$ 1.00
Exceeds $ 3,000 and does not exceed $ 5,000	2.00
Exceeds 5,000 and does not exceed 10,000	3.00
Exceeds 10,000 and does not exceed 25,000	4.00
Exceeds 25,000 and does not exceed 100,000	5.00
Exceeds 100,000 and does not exceed 200,000	7.00
Exceeds 200,000	10.00

Age	Expectation of Life	Present Value of Annuity of $1.00	Expectation of Life	Present Value of Annuity of $1.00
0	55.33	18.654946	57.52	18.791211
1	59.38	18.896098	60.63	18.961411
2	59.43	18.898774	60.60	18.959882
3	58.94	18.872381	60.07	18.932859
4	58.29	18.835843	59.41	18.897704
5	57.55	18.792982	58.66	18.856642
6	56.78	18.746885	57.87	18.811869
7	56.03	18.700404	57.05	18.763470
8	55.20	18.646487	56.20	18.710940
9	54.34	18.588377	55.32	18.654295
10	53.46	18.526405	54.43	18.594526
11	52.57	18.461011	53.52	18.530709
12	51.67	18.391971	52.62	18.464778
13	50.78	18.320706	51.72	18.395926
14	49.90	18.247205	50.82	18.324028
15	49.04	18.172210	49.94	18.250693
16	48.19	18.094555	49.08	18.175698
17	47.36	18.015627	48.22	18.097302
18	46.55	17.934488	47.39	18.018511
19	45.74	17.852507	46.57	17.937607
20	44.94	17.767392	45.77	17.855687
21	44.15	17.679468	44.98	17.771844
22	43.35	17.586813	44.21	17.686145
23	42.57	17.493149	43.45	17.598499
24	41.79	17.396152	42.69	17.507874
25	41.00	17.294368	41.95	17.416766
26	40.23	17.190201	41.20	17.320136
27	39.45	17.080961	40.46	17.221316
28	38.68	16.969314	39.73	17.120734
29	37.91	16.853798	38.99	17.015550
30	37.14	16.733212	38.25	16.905180
31	36.38	16.609337	37.51	16.791156
32	35.62	16.481242	36.77	16.673467
33	34.86	16.348813	36.02	16.550141
34	34.11	16.212846	35.27	16.420812

Age	Expectation of Life	Present Value of Annuity of $1.00	Expectation of Life	Present Value of Annuity of $1.00
35	33.35	16.069173	34.51	16.285362
36	32.59	15.920601	33.76	16.147219
37	31.83	15.767000	32.99	16.000550
38	31.07	15.608502	32.22	15.846649
39	30.31	15.440763	31.45	15,687251
40	29.55	15.268331	30.67	15,520092
41	28.78	15.087526	29.89	15,347000
42	28.02	14.902986	29.11	15.166525
43	27.26	14.709358	28.33	14.978300
44	26.52	14.514466	27.54	14.780784
45	25.75	14.304875	26.77	14.581429
46	24.99	14.090992	25.99	14.372373
47	24.23	13.866562	25.21	14.153005
48	23.48	13.637407	24.45	13.931528
49	22.74	13.403926	23.68	13.699420
50	22.00	13.163003	22.93	13.465784
51	21.26	12.910034	22.17	13.218350
52	20.53	12.652450	21.43	12.968148
53	19.81	12.390601	20.69	12.709881
54	19.10	12.123010	19.96	12.447134
55	18.41	11.851838	19.25	12.179543
56	17.73	11.577396	18.54	11.903283
57	17.06	11.298997	17.84	11.623104
58	16.40	11.012288	17.16	11.340549
59	15.75	10.723242	16.48	11.047192
60	15.11	10.430050	15.82	10.755310
61	14.48	10.129529	15.16	10.452956
62	13.85	9.822881	14.50	10.139150
63	13.25	9.519840	13.87	9.832982
64	12.65	9.207961	13.25	9.519840
65	12.07	8.900374	12.64	9.202657
66	11.50	8.584833	12.06	8.895071
67	10.96	8.283027	11.49	8.579265
68	10.43	7.973147	10.94	8.271333
69	9.92	7.672622	10.41	7.961453
70	9.43	7.371805	9.89	7.654205
71	8.95	7.075592	9.40	7.353387
72	8.49	6.779071	8.92	7.056253
73	8.05	6.495443	8.45	6.753287
74	7.63	6.212782	8.01	6.469659
75	7.22	5.935278	7.58	6.178940
76	6.82	5.658450	7.17	5.901436
77	6.43	5.381285	6.77	5.622916
78	6.06	5.118333	6.39	5.352858
79	5.72	4.866752	6.03	5.097012

Age	Expectation of Life	Present Value of Annuity of $1.00	Expectation of Life	Present Value of Annuity of $1.00
80	5.39	4.620501	5.69	4.844365
81	5.08	4.389174	5.37	4,605577
82	4.82	4.188442	5.08	4.389174
83	4.52	3.953385	4.77	4.149266
84	4.27	3.757503	4.50	3.937714
85	4.02	3.561622	4.24	3.733997
86	3.79	3.373183	3.99	3.537724
87	3.59	3.208643	3.76	3.348502
88	3.36	3.019421	3.50	3.134600
89	3.15	2.846653	3.27	2.945378
90	2.96	2.688694	3.06	2.772610
91	2.77	2.524565	2.85	2.593672
92	2.55	2.334521	2.62	2.394990

A PROBLEM ARISING OUT OF SECTION 4 OF THE SEIZURES ACT, R.S.A. 1933 Ch. 16

Can a judgment debtor pass good title to goods to a bona fide purchaser for value after they are seized?

It is submitted that as the law stands in Alberta today a judgment debtor can pass good title to goods to a bona fide purchaser for value, at any time up until the title passes to a purchaser under the writ of execution and even after seizure of the goods by the judgment creditor. In short it is submitted that the *bona fide* purchaser is in as good a position after seizure by the creditor, as he is in before and that the creditor gets no additional protection by seizing, at least against such a purchaser. This submission is made with all due respect to the opinion to the contrary of Mr. Justice Clarke in *Young v. Dencher,* 1923 1 W.W.R. 136 at 153. This, in the opinion of the writer, is the effect of section 4 of the "Seizures Act," R.S.A. 1933 Ch. 16 (1).

To establish this proposition it will first be necessary to ascertain the effect of the writ of *Fieri Facias,* commonly referred to as "fi fa," at common law. In the first place the writ in no way detracts from the property of the judgment debtor in the goods, but only gives to the sheriff a special property entitling him to sell or to maintain an action for trover (2).

How then did the writ affect the goods of the judgment debtor at common law? It had the effect, from the moment of the signing of the judgment and the teste of the writ, of binding the goods so that, while the debtor still had property in the goods, he could to no degree pass that property to any person, including a *bona fide* purchaser for value. The common law attached but little importance to possession of goods and to the ostensible authority to deal with goods which could reasonably be inferred from possession of them. And while hardship might be wrought in the case of the innocent purchaser who could not possibly know that the goods he could buy on Monday, he could not buy legally on Tuesday, because of an intervening writ, yet this was the common law. By Statute (29, Car II Ch. 3 Sec. 16), however, it was provided that the writ did not bind the goods until it was delivered to the sheriff to be executed. Delivery

(1) See page 3.

(2) Giles v. Gover (1832) L.C.L. and F.72.
Toole Pete Trust Company v. London Life 1935 3 W.W.R. 311.
Derring v. Gibbon 7 W.L.R. 178.

of the writ to the sheriff was an act of which the public could know nothing. In 1856 the legislature sought to remedy this inconvenience and by the Mercantile Law Amendment Act (19 & 20 Vict. C. 97 S. 1) it was provided that the writ should not bind the goods, as against a *bona fide* purchaser for value without notice of the writ being in the hands of the sheriff, until the goods were actually seized under it. The wording of the section in question is as follows: "No writ of *Fieri Facias* or other Writs of Execution and no Writ of Attachment against the Goods of a Debtor shall prejudice Title to such Goods acquired by any Person *bona fide* and for value consideration *before the actual Seizure* or Attachment thereof by virtue of such writ; provided such Person had not at the time when he acquired such Title, Notice that such writ, or any other writ by virtue of which Goods of such Owner might be seized or attached, had been Delivered to and remained unexecuted in the hands of the Sheriff, Undersheriff, or Coroner . . ."

This was the law as it stood in 1870 and became the law of Alberta. In 1893 the English Parliament enacted a similar action (3) to the above with the difference that the words "before the actual seizure" were omitted. By rule 609 of the Alberta Rules of Court, this later English section was taken over by Alberta, and then was re-enacted in the present Seizures Act, which reads as follows: "Every writ of execution shall from the delivery thereof for execution to a sheriff bind the goods of the judgment debtor situate within the judicial district of that sheriff, but not so as to prejudice the title to such goods acquired by any person in good faith and for valuable consideration unless such person had at the time when he acquired his title notice that such writ had been delivered to the sheriff and remained in his hands unsatisfied."

In the light of this brief history and judicial decisions, what are the arguments for and against the proposition that a judgment debtor can pass good title to goods to a *bona fide* purchaser for value, even after seizure of the goods by the sheriff?

Probably the strongest argument against the proposition is the opinion expressed by Mr. Justice Clarke in *Young v. Dencher* (4). In this case the sheriff seized some 1,300 bushels of wheat on a judgment debtor's premises. He then left the grain in the debtor's possession on the latter

(3) Sale of Goods Act, Ch. 71 Sec. 26 (1).
(4) 1923 1 W.W.R. 136 at 153.

signing a "bailee's undertaking" whereby he undertook to hold the grain on behalf of the sheriff. The debtor later removed the grain to a grain elevator, received storage tickets, and endorsed them over to the plaintiff bank as security for certain advances. The court held that a valid seizure had been made but had subsequently been abandoned and therefore under the Seizures Act, Sec. 4, and that the bank got priority over the judgment creditor.

Mr. Justice Clarke before deciding that the seizure had in fact been abandoned, raised the question of what would be the result of it were still effective. . . . His conclusion was that the bank would lose; he says, "It may then be argued that where the title is acquired by a *bona fide* purchaser *after the seizure,* which is the case here, the purchaser derives no benefit from the protecting part of the Rule and that the writ binds from the time of delivery of the writ to the sheriff. If the *seizure be maintained I think that would be the case,* but if the seizure be terminated by abandonment or otherwise then the purchaser would be in the same position as if he acquired title *before the seizure.*"

What then can be said for the proposition that a seizure is legally ineffective in protecting the execution creditor and that the *bona fide* purchase for value is in as good a position *after* seizure as before?

In the first place it is respectfully submitted that the quotation from *Murgatroyd v. Wright* (5) quoted by Mr. Justice Clarke is nothing but *obiter dicta.* In *Murgatroyd v. Wright,* the learned judge, in making the statement: "He (the purchaser) has to prove that he acquired the title to the goods in good faith and for the valuable consideration after the goods had been bound by the writ and *before the seizure,*" in no way had in mind the question which confronted Mr. Justice Clarke in *Young v. Dencher.* In the *Murgatroyd* case a bill of sale had been executed a full day before the seizure and the question of the effect of seizure was not really raised.

But even more important are the positive arguments. The writ of *fi fa* has never taken property out of the debtor. The writ at common law did however bind the goods from the moment of its issue and as against everyone. Superimpose upon the common law the enactment of our Legislature in the Seizures Act, or its predecessor Rule 609 of the Alberta Rules of Court, and there can be no argument as to the result. Seizure does not enter into the question; the word "seizure" does not even appear.

(5) Murgatroyd v. Wright: 1907 2 K.B. 333.

How then can any Court take it upon itself to change the position of the purchaser for value if he purchases after seizure? The court with equal justification might say that if he paid in silver money he could not acquire good title; seizure is only a step in procedure and there is no reason apart from legislation for the court to draw a line there. It is obvious therefore, that when a court reads into Section 4 of the Seizures Act the words "before the actual seizure" it is doing something more than superimposing our legislation onto the common law. It is looking at the Mercantile Law Amendment of 19 & 20 Vict. Ch. 97 Sec. 1 where those words were used. Then what is the situation? In the first place it can not be seriously contended that Rule 609 of our Rules of Court, a rule intended to cover completely the narrow point it encompasses, can be read in conjunction with the Mercantile Law Amendment Act, so that reading the two together the words "before the actual seizure" appear. One can not take a word or two out of a section of an earlier Statute and say that as those words are not in themselves inconsistent with words used in a section intended to deal with the identical subject in a later statute, that they are to be read along with the words of the section in the later Statute (6).

Then can a court interpreting Section 4 of our Seizures Act look at an earlier Statute, there see the words "before the actual seizure" and on this alone assume that the Alberta Legislature intended that those words should be read into its enactment? If a matter is altogether omitted from a Statute it is clearly not allowable to insert it by implication for to do so would "not be to construe the Act of Parliament, but to alter it" (7). The inserting of the words "before the actual seizure" is in direct conflict with a multitude of authorities on the interpretation of Statutes which state that when words are unambiguous they should be interpreted as they

(6) Where a statute made it actionable to sell a pirated copy of a work with knowledge that it was pirated, and a subsequent Act contained a similar provision but without any mention of guilty knowledge, it was held that the earlier Act was so far abrogated that an action was maintainable for a sale made in ignorance of the piracy. Gambart v. Sumner 29 L.J. Ex. 98.
Where an Act required that a consent should be given in writing attested by two witnesses, and a subsequent Act made no mention of the witnesses, this silence was held to repeal by implication the provision which required them.
Cumberland v. Copeland 31 L.J. Ex. 353.
Jefferys v. Boosey 4 H.L. Cases 943.
Hodgson v. Bell 24 Q.B.D. 525.

(7) Per James L.J. in Re Sneezum 1876 3 Ch. D. 436 at 472.

stand (8). This principle is so well established that it is referred to as the "Golden Rule" in the interpretation of Statutes.

In addition, in referring to the Statute of 19 & 20 Vict., as one must do in order to bring the question of seizure into discussion at all in connection with Section 4 of the Seizures Act, one is flying directly in the face of another well known principle that one should not go to an earlier Statute to get assistance in the interpretation of a later one (9).

Further, while little attention should be paid to an earlier Statute in interpreting a later one, it is submitted that if one does go to the earlier Statute, where the words "before the actual seizure" appeared, this merely tends to show that it was the intention of the legislature to draw no distinction between before and after seizure as far as the *bona fide* purchaser for value is concerned, for there is a strong presumption that

(8) "It is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity, it is wrong thing to do."
"We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."
Per Lord Loreburn L.C., Vickers 79 L.J.K.B. 955.
"The intention of the legislature however obvious it may be, must no doubt, in the construction of statutes, be defeated where the language it has chosen compels to that result, but only where it compels it."
Per Lord Atkinson, London and India Docks Co. v. Thames Steam Company 1909 A.C. 16 at 23.
In Crawford v. Spooner (1846) 6 Moore P.C. 9, the judicial Committee said: "We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend and by construction make up deficiencies which are left there."
And also the Altrincham Elec. Supply Ltd. v. Sale Urban Council 1936 L.T. 379 per Lord MacMillan.
Gray v. Pearson 6 H.L. Cases 106.
Hampstead v. Cotton 1886 12 A.C. at 6.
Rhodes v. Rhodes (1882) 7 A.C. at 205.
Gundry v. Pinniger 21 L.J. Ch. 405 per Lord Cranworth.
Abbot v. Middleton 1858 7 H.L. Cases.
Young v. Mayor of Leamington 1882 8 Q.B.D. 579.
Maxwell Interpretation of Statutes 6th Ed. P. 3-35 inc.
Craies on Statute Law 3rd Ed. P. 65-88 inc.

(9) Ouillette v. C.P.R. 1925 A.C. 569 at 574 and 575.
Oei Tjong Swan v. Commissioner of Stamps 1933 2 W.W.R. 1.

(10) Income Commissioners v. Pemsel 1891 A.C. 531 at 549.

(11) 29 L.J. Ex. at 99 per Bramwell B.: "A previous statute made guilty knowledge necessary in proceedings of this kind; then came the statute in question which gives a right of action without that ingredient. If the second statute had stood alone it could scarcely be doubted that knowledge is not essential to create the liability. In my opinion the existence of the former Act strengthens instead of weakens that position, for, it is more reasonable to think that the legislature meant that the absence of that ingredient, before material, should be immaterial for the future."

Parliament does not make mistakes (10), and that therefore these words were deliberately omitted. The case of *Gambert v. Summer* (11) furnishes strong support for this reasoning.

In the light of the foregoing it is submitted that the law as regards Section 4 of the Seizures Act is not what it is generally believed to be, and that as the law stands, an execution creditor has no more protection after seizure than before, as against a *bona fide* purchase of the judgment debtor's goods.

If this be correct, a legislative amendment to protect the creditor after seizure seems desirable. Seizure means the taking possession of goods. It is one of the duties imposed on the sheriff by reason of the execution. Moreover, in order that the seizure be valid as against third parties the sheriff must retain possession (12). The existence, therefore, of a valid seizure would in most cases give notice to a prospective purchaser of the fact that a writ of execution had been issued against the goods of the person from whom he was going to buy, and such purchaser having notice could acquire no title to such goods. The execution creditor receives at least this additional protection by seizing. But what about the case where the purhaser by letter or telephone buys goods which he has examined previously, and forwards payment? Here he has no notice from the fact of seizure and from the fact that the sheriff's man is in possession that there has been a writ issued against the goods and he is protected by his own blissful ignorance. He is a *bona fide* purchaser for value and gets good title to the goods. It is submitted however that when an execution creditor has seized, that is when he has gone to the expense of retaining possession of goods by keeping a man in charge of them, he should get priority to a *bona fide* purchaser for value who in buying goods sight unseen is the one who is giving the debtor an opportunity to be fraudulent. It is only equitable that where one of two innocent persons must suffer for the fraud of a third, it should be the one that has made that fraud easy for the rogue. It is therefore suggestted that Section 4 of the Seizures Act should be amended to include the words "before the actual seizure."

W. A. McGillivray.

(12) Ackland v. Paynter (1820) 8 Price 95.
Young v. Dencher 1923 1 W.W.R. 136.

NOTE: It is not so clear that the author's suggested amendment is desirable. As he states, there will not be many cases of *bona fide* purchase after seizure. In such cases the purchaser has parted with present value to the extent of the purchase price. The seizing creditor stands to lose only a stale debt. In common with other cases of this type the problem of which of two innocent persons gave a rogue an opportunity to perpetrate a fraud is two-sided. Suppose the execution debtor has, at the creditor's suggestion, agreed to hold the goods as bailee for the sheriff?

M. M. M.

THE DEBT ADJUSTMENT AMENDMENT ACT AND THE LIMITATION OF ACTIONS ACT—A PROBLEM IN STATUTORY INTERPRETATION*

The question of the effect of the striking out of the section of the Debt Adjustment Act, 1937, which suspended the operation of the Limitation of Actions Act, 1935, in actions barred by the Debt Adjustment Act, is one of considerable interest. It appears to have been considered in only two cases, both decided by District Court Judges.

The first, *Walker v. Keim* (1) was the case of a simple contract debt, the last acknowledgment of which was made in 1929. Judgment was given for the creditor under The Small Debts Act, and the debtor appealed to the District Court, pleading the Limitation of Actions Act. The effect of this Act would normally be to limit the time for bringing an action of this sort to six years, and would bar the right of action in *Walker v. Keim*.

The Debt Adjustment Act, 1933, c. 13, s. 9, however, provided:

> "The period during which a certificate is in force as well as any period during which by reason of the refusal by the Board to grant a permit the right to commence any action is suspended shall be excluded in the computation of the time within which an action must be commenced pursuant to the provisions of any statute in force in the Province which limits the time within which actions may be brought."

An amendment in 1934, c. 11, added Section 9a.:

> (1) "The period during which proceedings by a creditor are prohibited under this Act shall not be included in the time within which an action or other proceeding is to be commenced under The Limitation of Actions Act, being chapter 90 of the Revised Statutes of Alberta, 1922, or under any other statute or law for the time being in force in the Province limiting or prescribing the time within which actions or proceedings are to be commenced: and any party to an action or other proceeding which has been prohibited by this Act shall have the same time for continuing such action or proceeding after the expiry of the said period as he

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*The immediate problem herein discussed has been rendered academic by Chapter 42, Section 9 of the Statutes of Alberta, 1941 (which came to hand after the type for this article had been set. This latest enactment restores Section 11 and retroactively re-enacts it so that it shall stand as if it never had been repealed, retroactively or otherwise.—M.M.M.

(1) 1938 3 W.W.R. 405.

would have had if the action or proceeding had not been prohibited, and shall not be prejudiced by reason of the delay.

(2) "For the purpose of this section the proceedings mentioned and described in subsection (1) of section 6 of this Act shall, in so far as a resident and a creditor of a resident are concerned, and whether or not such creditor has applied or hereafter applies to the Board for the issue of a permit pursuant to the said subsection (1) or for the written authority of the Board pursuant to subsection (3) of section 8, be deemed to have been prohibited so long as this Act remains in force, subject to the provision contained in subsection (3).

(3) "Upon the issue of the permit or written authority of the Board, the period subsequent to the issue thereof shall be included in the time within which the action or other proceeding affected thereby is to be commenced under The Limitation of Actions Act or under any other statute or law for the time being in force in the Province limiting or prescribing the time within which actions or proceedings are to be commenced."

In the repealing and consolidating Debt Adjustment Act, 1936, c. 3, and again in 1937, c. 9, this section was re-enacted as s. 11, with reference to "The Limitation of Actions Act, 1935," instead of to "The Limitation of Actions Act."

Without anything else this section would suspend the Limitation of Actions Act in any action which might be barred by the refusal of the Board to grant a permit to proceed. Thus on the facts of *Walker v. Keim,* the last acknowledgment was made in 1929, and at that time the Limitation of Actions Act began to run. In 1933, or more certainly in 1934, by s. 9a, however, the Limitation of Actions Act was suspended with relation to this action, and for limitation purposes the time remained five years right up to 1938.

The interesting point in the case arises as a result of an amendment to the Debt Adjustment Act by s. 4, c. 27, 1938, which provided:

"The said Act" (referring to the Debt Adjustment Act, 1937), "is further amended as to section 11 by striking out the same."

The question was whether or not this amendment was retroactive. If it was, s. 9a (and s. 11) would be ineffective, the Limitation of Actions Act would be treated as never having been suspended, and the debt in *Walker*

v. Keim would have gone unacknowledged for a period of nine years, three years in excess of the statutory period of limitation.

Mahaffy, D.C.J., decided that the amendment in 1938 was retroactive, that the Limitation of Actions Act, 1935, had never been suspended, and that the creditor's right of action was gone by reason of the fact that there had been no acknowledgment for nine years.

The second case, *Grant v. Debolt* (2), arose in 1939 on very similar facts, but Matheson, D.C.J., decided that the amendment in 1938 had no retroactive effect—i.e. that the limitation in the Limitation of Actions Act did not cover the period from 1933 to 1938. In his decision he considered the case of *Walker v. Keim,* and also discussed the question of the retroactive effect of statutes generally, referring to the Alberta Interpretation Act, c. 1, R.S.A. 1922, s. 13, and to the case of *Upper Canada College v. Smith* (3).

The legislation thereafter resolved the difficulty by enacting as section 40a (for the history of the section numbering see ch. 27 Statutes of Alberta, 1938, section 8) the following: "Notwithstanding the repeal of section 11 of this Act effected by section 4 of the Debt Adjustment Act, 1937, Amendment Act 1938, the provisions of that section shall be deemed to be continued in force so far as the same relate to any time prior to the eighth day of April, 1938." It is respectfully submitted, however, that there was another answer to this problem, which made the determination of the question of the retroactive effect of the 1938 amendment unnecessary.

First let us examine the history of the statutes in question. The original Debt Adjustment Act was enacted in 1923 (c. 43), and was in two parts, the first restricted to the drought stricken areas of the Province, the second of general application, but this part was never proclaimed. This Act was repealed in 1931 and re-enacted to be of general application. Both these Acts set up machinery whereby a debtor could apply for the protection of the Act, and the Debt Adjustment Board could, if it saw fit, grant him a certificate which would give him the protection. In 1933 the Debt Adjustment Act, 1931, was repealed and re-enacted. In this Act it was provided that no proceedings should be taken in certain classes of action without first applying to the Board for a permit to commence such action. The Act

(2) 1939 2 D.L.R. 746.
(3) (1920) 57 D.L.R. 648.

was once more repealed and re-enacted in 1936, and again in 1937, but for our purpose it is enough to say that the only effect of these re-enactments was to widen the scope of the Act to cover more classes of action.

The Limitation of Actions Act was first passed in 1922 (c. 90), and consisted of four sections, none of which has any application to the cases we are considering. In 1923 (c. 5, s. 48) this Act was amended by the addition of Section 5, which read:

> 5. "In calculating the time within which an action or other proceeding must be commenced as fixed by this Act or any other Statute, the time during which such action or proceeding was barred by the provisions of the Drought Area Relief Act or The Debt Adjustment Act shall be excluded from such calculation."

If this section is unrepealed, it suspends the operation of the Limitation of Actions Act against actions barred by the Debt Adjustment Acts, regardless of the effect of s. 9a (later s. 11) of the Debt Adjustment Act and the retroactive effect of the 1938 amendment.

In 1935, The Limitation of Actions Act, 1935 (c. 8), was passed. This extended very considerably the application of the Act, but did not profess to be a repealing and consolidating Act. The only words of repeal are contained in Section 52:

> "Sections 2 and 3 of The Limitation of Actions Act, being chapter 90 of the Revised Statutes of Alberta, 1922, and section 54 of the Trustee Act, being chapter 220 of the Revised Statutes of Alberta, 1922, are hereby repealed."

Thus Sections 4 and 5 of the old Limitation of Actions Act are left on the books.

If we look at The Interpretation of Statutes Act, R.S.A. 1922, c. 1, s. 15, ss. (2), we find:

> "If there is no provision in the substituted enactment relating to the same subject matter, the repealed enactment shall stand good and be read and construed as unrepealed in so far, but in so far only, as is necessary to support, maintain, or give effect to such unrepealed enactment or rule, order or regulation made thereunder."

This clearly applies to the present status of the Limitation of Actions Act. No reference is made in the 1935 Act to the Debt Adjustment Act, nor is the old section referring to the Debt Adjustment Act repealed. Therefore this old section (1923, s. 5) must be "read and construed as unrepealed."

The only other question is whether or not the reference in s. 5 of the old Limitation Act to "The Debt Adjustment Act" can be construed as a reference to "The Debt Adjustment Act, 1933", or "The Debt Adjustment Act, 1937". Here there might be some room for argument were it not for the Alberta Interpretation Act. Section 15, ss. (1) of this Act provides:

> "Whenever any enactment is repealed and other provisions are substituted by way of amendment, revision or consolidation, any reference in any unrepealed enactment (or in any rule, order or regulation made thereunder) to the repealed enactment shall as regards any subsequent transaction, matter or thing be held and construed to be a reference to the provisions of the substituted enactment relating to the same subject-matter as the repealed enactment, whether the repealed enactment be an enactment of this Province or an Ordinance of the North-West Territories or an enactment of any other province or of Canada."

In this case, the "reference in any unrepealed enactment" (Limitation of Actions Act, s. 5) "to the repealed enactment" (The Debt Adjustment Act, 1923) "shall . . . be held and construed to be a reference to the provisions of the substituted enactment" (The Debt Adjustment Act, 1937).

To sum up, Section 5 of the old Limitation of Actions Act is applicable to the provisions of the Debt Adjustment Acts, 1933, 1936 and 1937, and, therefore, the time during which an action is barred by the Debt Adjustment Acts is excluded from the operation of the Limitation of Actions Act, 1935. This means that regardless of the insertion of saving clauses in the Debt Adjustment Acts and their later removal, the Limitation of Actions Act, 1935, does not run against claims within the scope of the Debt Adjustment Act, and the legislature has failed to remove the suspension of the operation of the Limitation of Actions Act, retroactively or prospectively.

D. R. McCormick.

IMPLIED CONDITIONS AS TO MERCHANTABLE QUALITY

Under the old common law *caveat emptor* was the general and accepted rule in cases concerning the sale of goods. As trade and commerce developed, however, certain exceptions were made to the rule and warranties were implied in sales where the buyer necessarily relied on the skill or judgment of the seller. These common law exceptions to the general rule of caveat emptor are admirably set out in *Jones v. Just* (1).

In 1893 the law with respect to implied warranties was codified in England by the Sale of Goods Act. Because the Act was merely an attempt to codify the common law it was inevitable that many cases would arise that were not provided for by the Act. Such cases did in fact arise, and the courts in an attempt perhaps to keep pace with the changes in modern trade and commerce tended to restrict the rule of caveat emptor. The result was that, as has been suggested, *caveat emptor* is now the exception rather than the rule.

The original Sale of Goods Act in England has been followed almost word for word in all the Acts of similar nature in Canada. In the Alberta Act (2), section 16, sub-section 3 reads: "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there shall be an implied condition that the goods shall be of merchantable quality (3), provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed." This section, probably more than any other, has given rise to a great deal of difficulty, because the Courts have been unable to interpret successfully and consistently the words "sale by description." Did the legislature intend this phrase to be interpreted strictly, as when a man enters a shop and asks for say a certain amount of cloth of a particular colour, size, shape, texture and so on? Or did it intend it to apply to the case where he enters and asks for a bottle of a particular brand of say ginger ale? At common law

(1) L.R. 3 Q.B. 197.
(2) R.S.A. 1922 C. 146, S. 15.
(3) Merchantable quality does not mean merely saleable, but is used as meaning "the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again."
Bristol Tramways v. Fiat Motors, Ltd., 1910 2 K.B. 831 (C.A.) per Farwell L.J. at p. 841.

a sale by description applied only to the case of the seller supplying goods which the buyer had described, but had had no opportunity of inspecting before the contract was made. There the main element in a sale by description was the seller's obligation to furnish goods answering the agreed description because the buyer had no chance to inspect the goods; this general idea is carried in the Act wherein we find it provided that there shall be no implied condition as to patent defects where the buyer has examined the goods. In *Wren v. Holt* (4), Vaughan Williams, L.J., expressed the opinion that on over-the-counter transaction could not constitute a sale by description; however, in that particular case he was forced to find that an over-the-counter sale was a sale by description in view of the jury's finding of fact. In *Grant v. South Australian Knitting Mills Co.* (5), the Judicial Committee of the Privy Council found a sale by description where the seller went into the shop and asked for underwear, the seller recommended an article and the purchase was made.

But what of the case of a buyer going into a store and asking only for an article of a specific brand, perhaps an article sold under its trade name? Can this be a sale by description? This question was brought squarely before the court in *Morelli v. Fitch and Gibbons* (6). The plaintiff entered the defendants' wine shop and asked for a bottle of Stone's Ginger Cordial, a well-known beverage sold by the defendant but bottled and sealed by the manufacturer. Due to a latent defect in the bottle, the plaintiff was injured while opening it and brought action against the retailer. The Court found that there had been a sale by description and held the retailer liable. It is submitted that this case has made every sale of goods a sale by description, and has made the implied condition of merchantability apply to every sale except (1) where the seller is not a dealer in the goods sold, and (2) when the buyer has examined the goods, in which case there is no condition as to defects that such examination ought to have revealed. The *Morelli* case thus widened appreciably the liability of the retailer. It has been followed without question by Cardozo,

(4) 1903 1 K.B. 610 at p. 615.
(5) 1936 A.C. 85 (J.C.).
(6) 1928 2 K.B. 636.

C.J., in *Ryan v. The Progressive Grocery Store* (7) and by the King's Bench Division in *Daniels v. R. White and Sons* (8).

It will be seen from the foregoing, that the trend of modern cases has been to interpret the phrase "sale by description" widely to include not only sales which are made on the strength of specifications demanded by the buyer, but also sales which are made when the buyer relies on his own experience with the identical article and asks for such article by name, rather than by description. "Sale by description" now includes nearly every selling and buying transaction.

Should the retailer be held liable for injuries suffered by the consumer of defective goods, sold by the retailer in the same state as he received them from the manufacturer? Should he become an insurer for the consumer against the risk of injury from defects in his merchandise? The modern tendency, as has been pointed out, has been to answer this in the affirmative; this is another manifestation of the recent inclination to extend the doctrine of liability without fault. At first glance such a rule would seem to impose a hardship on the retailers; this is, however, hardly true, because the retailer would obviously have an action against the wholesaler or the distributor of the goods, and in the final analysis the loss would rest with the manufacturer, who would provide for such loss as one of the hazards of business. But an injured consumer has an action against the manufacturer directly, an action that is delictual rather than contractual, in which negligence on the part of such manufacturer must be proved, *McAlister v. Stevenson* (9). To prove negligence in such cases is, however, not always an easy task; not as easy, for instance, as it would be to fasten liability on the retailer under Sub-section 3 of Sec. 16 of the Act (Alta.).

It is submitted, then, that the manufacturer should be liable, firstly because the consumer is placing more reliance on him than on the retailer; secondly, because if there is fault, it usually lies with him; and thirdly, because he is usually in a better position to withstand such loss than is the retailer. If the manufacturer is to be held liable for defects in his goods

(7) 175 N.E. 105 (1931). The N.Y. Pers. Prop. Law (1909) as added by Laws 1911, C. 571; ss. 96 (2) provides that a warranty of merchantable quality is amplied where goods are sold by description by a vendor dealing in such goods.
(8) 1938 3 All E.R. 258 (K.B.D.).
(9) 1932 A.C. 562 (H.L. (Sc.)).

which the consumer has not seen and would not have been able to see at the time of the sale, it is submitted that legislation should be enacted relieving the retailer of liability. Such legislation, by holding the manufacturer liable directly, would eliminate the necessity of proving negligence; would do away with the circuity of action involved in reaching the manufacturer by way of the Sale of Goods Act; and finally would provide for actions which, in the present state of the law in respect to conditions and warranties, are unavailable to the ultimate purchaser because of the contractual nature of such actions.

Nevertheless, a theoretical action against a manufacturer whose place of business is outside the jurisdiction would be of little value to the injured consumers. The legislation calls for careful drafting which would make the manufacturer primarily liable and the retailer only secondarily liable.

J. H. Corbett,
J. H. Jamieson.

Note: cf. two articles in our next issue on *McAlister v. Stevenson.*

In one of these Mr. A. S. Williamson reasoning from the torts concept of a duty to exercise reasonable care, deplores the trend toward strict liability, which extensions of *McAlister v. Stevenson,* aided by the *res ipsa loquitur* technique of treating defective products as strong circumstantial evidence of negligence are imposing on the manufacturer. After the *Morelli* case and before the *McAlister* case the retailer was liable without fault on the implied condition in the contract of sale, while the manufacturer owed no duty to exercise care with respect to the retailer's customer, or any other ultimate consumer, unless his product fell into that peculiar category of things "inherently dangerous."

Since *McAlister v. Stevenson* the law has resolved this moral anomaly, and is in fact approaching the recommendation made by Messrs. Corbett and Jamieson in their concluding paragraph.

M. M. M.

IN RE GREEN ESTATE—1940 1 W.W.R. 199

In the recent case of *In re Green Estate* before the Manitoba Court of King's Bench, testator named his sister as the sole executrix and beneficiary. She died in 1924, leaving her husband and a son. Meanwhile testator had left Canada and gone to United States and then to Russia where he was last heard of in 1930. In March, 1939, a Surrogate Court Judge made an order that the applicant for administration be given leave to make an affidavit that testator died on a day subsequent to May 15, 1930.

At the date of the testator's will, s. 31 of the Manitoba Wills Act (1) read as follows:

> "31. Where any person, being a child or other issue of the testator, to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appear by the will."

In 1935 the Act was amended by including brothers and sisters of the testator as legatees and devisees to whom the non-lapse provisions applied. The husband and son claimed the assets on the ground that the testator was alive at the date of the amendment, which claim was opposed by the next-of-kin, who contended that the bequest had lapsed. No evidence was offered to establish that testator was alive or dead at any particular point of time.

The case raises very neatly the question of the function of the presumption of death from seven years unaccounted-for absence. Robson, J.A., while recognizing that upon the expiration of the seven-years period the testator is presumed to be dead, held that there is no presumption either that he was alive up to the end of that period or that he died at any particular point of time during such period, and the onus is upon those who base a right upon his having survived a particular period to establish that fact affirmatively by evidence. Consequently, the claim failed.

This appears to be a true and accurate statement of a rule which has grown up, subject to vicissitudes, over a period of more than a century. It had its faint beginning in the case of *Doe d. George v. Jesson* (2) in

(1) R.S.M. 1913, Ch. 204.

1805, and received confirmation in the leading case of *Nepean v. Doe d. Knight* (3) in 1837. Both these cases were ejectments in which the first step of the claimants in establishing their titles was to show that they had brought their actions within the period allowed by the Statute of Limitations, which in turn depended on the time of the death of those through whom they claimed.

Both decisions, while in conformity with the *Green* case, contain dicta which have misled many Courts since. These are to the effect that there is a presumption of the continuance of life during the period which throws the onus of showing death on those claiming it. In *In re Phene's Trust* (4), Sir G. M. Giffard, L.J., points out the fallacy of this position by arguing that such a presumption would necessarily carry the time of death to the end of the seven-year period, which it did not in either of the above-mentioned cases. There is nothing in the rule to affect the onus of proof until the expiration of the period, upon which a rebuttable presumption of death arises. This presumption casts a scondary onus only upon the party which does not wish the presumed fact to exist (5).

The doctrine frequently is approved in the Courts by such expressions as ". . . the time of death . . . must be the subject of distinct proof" or ". . . sufficient evidence there must be, or the person asserting title will fail." That the rule is prejudicial to the party who must establish the exact date of the death is obvious when it is realized that all that may prevent his success is the protection that the rule gives to the opposing litigant. In every case there is necessarily uncertainty, but in no case is he given the benefit of the doubt.

It is interesting to note the change effected by the above-mentioned section of the Manitoba Wills Act in the common law concerning lapse. Ordinarily, where a will contained a residuary devise, unless the contrary intention appeared, lapsd specific devises of real property or bequests of personalty fell into the residue, or, failing such residuary devise, passed as on intestacy. That the estate of the devisee or legatee should gain no advantage whatsoever by virtue of the original intention of the testator was

(2) 6 East 80 (1805 K.B.).
(3) 2 M. and W. 894 (1837—Exchequer).
(4) L.R. 5 Ch. App. 139, 149.
(5) This secondary onus is discharged (i.e. the presumption is rebutted) by the introduction of sufficient evidence to make it impossible for the jury to come to a definite decision as to whether the absent person is dead or alive.

a situation too inequitable to remain long unchallenged. Provisions similar to the original section 31 in Manitoba have long been general throughout the Provinces of Canada. But the amendment of 1935 is not yet general although it is to be found also in Ontario (6). It is to be hoped its value will ere long become more widely realized.

C. A. Campbell.

(6) R.S.O. 1937, Ch. 164, s. 36.

décision basée sur le cas de *McAlister v. Stevenson* (4). The X Motors Ltd. était négligent en louant des automobiles avec des freins défectueux; et je soutiens que le loueur n'avait pas l'obligation de faire une inspection, et donc la responsabilité doit tomber sur The X Motors Ltd.

Alors, pour les deux raisons suivantes, je donne jugement pour le demandeur. L'étranger B, avait l'automobile avec le consentement implicite due propriétraire, The X Motors Ltd., lorsque l'accident eut lieu; et The X Motors Ltd. par le fait de louer des machines défectueuses s'est montré négligent. Je dois donc rendre jugement pour la demandeur William Green; la responsabilité tombant sur The X Motors Ltd.

Ford (Président): Nous nous trouvons dans une situation unique. Je tiens à féliciter bien sincèrement les étudiants qui comme avocats ont présenté leur arguments avec beaucoup d'habilité. C'est une bonne chose qui promet pour l'avenir. Je veux aussi exprimer au Doyen de la faculté de Droit mon appréciation de la sympathie qu'il a montrée envers la langue française en permettant un plaidoyer dans une cause fictive entièrement dans cette belle langue.

Le problème à resoudre présente plusieurs difficultés. Voici l'énoncé de la question: "Si dans les circonstances le défendeur avait un devoir quelconque envers le demandeur cela le rend responsable en dommages interêts pour le dommage causé."

Il se peut que le principe de la décision dans le cas *Englehart v. Farrant,* que la Cour Suprême du Canada semble avoir appliqué dans le procès *Gillespie Grain Co. v. Kruposki* soit celui qui doit être appliqué ici, mais je suis d'avis que la décision de notre Division d'Appel *Deugau v. Kramer* (1938) 3 W.W.R. 269, suivante celle de la Cour d'appel du Manitoba *Martel v. Dominion Motors* nous oblige de dire que le défendeur ici n'est pas responsable au demandeur. La décision ici doit dépendre du statut dont il y était question. J'avoue que je suis arrivé à cette opinion après une certaine hésitation et avec des doutes parce que, si l'homme à qui le défendeur a prêté son automobile peut être considéré comme son employé ou son agent, et les circonstances dans lesquelles cet employé a laissé l'automobile mal gardé, peuvent être considérées négligentes, je pense qu'en dehors du statut, c'est-à-dire en droit commun, le propriétraire est responsable parce que, si l'automobile avait été pourvu de freins

(4) 1932 A.C. 622.

effectifs, l'accident aurait pu être évité. A mon avis l'expression de Lord Wright, dans *Geel v. Winnipeg Electric Company* ne veut pas dire que l'absence de freins effectifs ne doit jamais être considéré comme une négligence entrainant une responsabilité civile.

Par ces motifs l'action doit être rejetée avec dépens.

DUBUC, J.: Les faits ci-dessus énoncés donnent lieu aux deux questions suivantes: premièrement, est-ce que la sec. 71 (a), de "Vehicles and Highway Traffic Act, 1924," amendée en 1933 rend le propriétaire d'un automobile prêté responsable d'un accident causé par un autre que l'emprunteur? deuxièmement, est-ce que X Motors Ltd. a été coupable de négligence en louant un automobile avec des freins défectueux?

Quant à la première question, tout dépend de l'interprétation que l'on doit donner aux mots de la section 71 (a) " . . . every person driving who has acquired possession of it with the consent, implied or expressed, of the owner. . . ."

Dans *Martel v. Chartier and Dominion Motors* (1935 1 W.W.R. 305) cas décidé par la Cour d'Appel du Manitoba, et où les faits étaient semblables à ceux de la cause présente, le propriétaire ne fut pas tenu responsable. Trueman, J.A., était d'opinion que les mots "consent, express or implied" étaient applicables entre l'emprunteur et le propriétaire et non entre l'emprunteur et le tiers, mais plus loin il semble croire qu'en cas d'urgence, le consentement tacite pourrait exister, par exemple lorsque l'emprunteur avait un chauffeur, ou que l'emprunteur avait été blessé par suite d'un accident, et qu'un étranger avait, en reconduisant la machine blessé quelqu'un. Un autre juge, Robson, J.A., dit ceci au sujet de la section de l'acte du Manitoba (qui est presque identique à la nôtre):

"The subsection is a very strong one enlarging the common law liability of an owner very seriously and should not be extended beyond its reasonable implication."

Dans cette province la Cour d'Appel confirmait le jugement du juge Ewing dans *Deugau v. Kramer* (1938 2 W.W.R. 297). Le propriétaire ne fut pas tenu responsable, bien que l'emprunteur fût assis à coté du tiers qui était au volant au moment où l'accident eut lieu. Ewing J. décida que le sens des mots de la section 71 (a) "person driving" était limité à la seule personne qui était au volant. Si c'est là le sens de la section, on ne peut soutenir dans le cas présent qu'il y avait consentement, explicite ou tacite, entre le propriétaire et B, l'ami de A, l'emprunteur. Je

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suis d'opinion que la cause *Kramer v. Deugau,* doit être suivie, et je soutiens que la section 71 (a) ne saurait être interpreté en faveur du demandeur.

Avant que le demandeur ne puisse recourir contre le défendeur pour un acte de négligence, il doit y avoir obligation de la part du défendeur vis-à-vis du demandeur, et il doit y avoir un manque au devoir de la part du défendeur. On ne pourrait soutenir ici que X Motors Ltd. ont manqué au devoir envers le demandeur. Est-ce que c'était leur devoir de veiller à ce que les freins soient en bon ordre lorsque A empruntait la machine? Certainement il y avait obligation de la part de X Motors Ltd. de louer leur machine en bon état. Mais ce devoir ne s'étendait pas à B, que X Motors Ltd. ne connaissait pas; il y avait contrat entre X Motors Ltd. et A, mais non pas entre le défendeur et B.

Je ne puis voir comment la doctrine de *McAlister v. Stevenson* (1932 A.C. 562) peut s'appliquer ici; je crois que le dictum de Lord MacMillan, cité par M. Lebel, exprime succinctement le principe:

"It may be a good rule to regard responsibility as ceasing when control ceases."

Par ces motifs, l'appel doit être rejeté.

UNIVERSITY OF ALBERTA
FACULTY of LAW
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When the Quarterly commenced publication in the fall of 1934 we realized that if we became a success we would soon find ourselves short of back numbers. We may have been too modest or simply too stupid but the extra copies we laid away to meet future demands are now exhausted. This has been due largely to other legal periodicals seeking to establish exchanges with us and to graduating students desiring to purchase complete sets. While we regret our lack of foresight, it was in a sense unavoidable. We had no experience whatever, and most people thought that a law school our age and size could not carry a periodical. We spent all our revenue as it was, and did not feel justified in running into debt to meet a problematical future demand.

This year we bound six years (three volumes) in one large volume. It made an attractive and surprisingly useful compilation of legal material —and we were unable to meet the demand of most of the graduating class for complete sets to date. There must be some law offices wherein several firm members subscribed during our early years simply because they wished to support our attempt to establish the first legal periodical to be published by a Canadian Law School. We would be extremely grateful if any early subscriber who has discontinued his subscription would write advising us what parts he has which he is willing to sell to students who are seeking to get complete sets. We will then put the students who want back numbers in touch with those who have them to dispose of. We regret that we cannot buy them directly, but all our spare money for some time to come will be spent in printing several hundred extra copies, so that when after the war, we reprint our earlier issues we will not have to carry that process beyond last year.

Although our mailing list pretty well encircles the globe, and quite a number of copies go to American Law schools, we have practically no Canadian subscribers outside Alberta except that Carswell & Company sell thirty copies of each issue for us. This means that our circulation is so far practically confined to Alberta, and there to the Judiciary (which has generously supported us from the first) the leading firms in Edmonton and Calgary, with a sprinkling from the smaller cities and country points. In addressing the envelopes for this issue I was impressed by the number of addresses which I recognized as out of date. If you are one of our subscribers whose address is incorrect will you please notify us so that we can make the necessary change in our mailing list. The mailing list is

normally handled by the business manager, a student, who is not usually acquainted with many graduates of more than two years standing. A large number of our recent graduates names contain the notation "Cancel Active Service." The Quarterly will be of no value to them for the duration but we will have a reserve of future issues for them if they wish to complete their sets when they return. In the meantime if the Quarterly is to survive the war, because our heaviest subscription coverage (recent graduates) coincides with the age group from which there are the heaviest enlistments, we must have more subscriptions from the older members of the profession. I think that the Quarterly has already proven its value in the province and that it can sell itself on its merits. Apart from its educational value to the students who participate in preparing it for publication, and each student is encouraged to, it is worth $1.50 to anyone practicing law in Alberta. But a great many potential subscribers have never been canvassed. Most members of the profession would gladly subscribe if approached, but it is one of those little things that man does not get around to unless he is approached. Besides the cost of a subscription is so small that people do not like to waste a stamp and bank exchange on such a trifle.

Until the election of officers next fall the business duties of the Quarterly rest upon Mr. W. Y. Archibald, Stettler, Alta., and Mr. L. Lebel, St. Paul, Alta. These gentlemen will be pleased to co-operate with any present or past student of the school who would be good enough to help the Quarterly increase its subscription list. Mr. J. D. Foote, Didsbury, Alta., has convinced me that he can add greatly to our advertising revenue in the years to come and if anyone knows of a good advertising prospect Mr. Foote would be pleased to receive such communication.

We want to keep going and to increase our circulation, and to accumulate a surplus against the time when we will be able to reprint the issues of the first six years. The Quarterly strengthens the bond between the law school and its graduates and we ought to hold on our subscription lists a large portion of our graduates.

M. M. M.

THE EDUCATION OF A LAWYER

An address by the late Ira A. MacKay, B.A. (Dalhousie), M.A. (Dalhousie), LL.B. (Dalhousie), Ph.D. (Cornell), LL.D. (Queen's), sometime Dean, Faculty of Law, University of Saskatchewan, sometime Dean, Faculty of Arts, McGill University, delivered at the Third Annual Meeting of the members of the Law Society of Alberta, held in Calgary during December 18th and 19th, 1913.

It is perhaps superfluous to indicate Dr. MacKay's educational qualifications. No one can read this address without realizing that it is the product of a mind of extraordinary clarity. The address was offered to us for publication by John W. Hugill, K.C. It was printed in pamphlet form by Burroughs & Co., Calgary, but was never included in any bound volume. Although we are crowded for space this year, we feel that material of this class should be preserved. We therefore reprint it, with the kind permission of Burroughs & Co.

Mr. Chairman, Brethren of the Legal Profession:

When I received your invitation to attend this meeting, I had some difficulty at first in deciding upon what subject I should try to speak to you. Realizing, however, that I am in the somewhat peculiar position of being at once a professor of philosophy and a lawyer—howbeit, I fear, a rather backsliding member of both these great communities—I finally came to the conclusion that you would expect me to speak to you on some subject relating to legal education. With your kind permission, therefore, I shall try for a short time this afternoon to speak with you in a wholly informal manner, and I hope too, in a wholly unpretentious manner, about the education of a lawyer and what I believe it ought to be.

The last century has been a period of unusual advance in human knowledge. There is now scarcely a nook or cranny or doghole of human intelligence but which has had its crops of eager students at work exploring its secrets and defining the results of their discoveries in exact practical formulae for the information of men. Possibly this mania for careful study and research may have produced a great lot of what may perhaps be described as unprofitable diligence. Nevertheless the total results gained more than repay the labor spent a hundred fold. It is not true, as is sometimes supposed, that this progress has been wholly or even mainly on the side of the natural sciences. The social and political sciences have also had their due share. Hospital reform, prison reform, sanitary reform,

municipal reform, the growth and development of public school systems and universities, the organization of vast systems of constitutional government; these and many other subjects like them testify clearly to the advance which has been made in the practical science of government. The construction of great railway lines and other means of transporting human commodities and human intelligence from one part of the world to the other, the advent and development of the joint stock company, the expansion of great insurance, trust, banking and financial institutions, the menacing union of capital on the one hand and the equally menacing union of labor on the other; those and many others testify with a perfect tumult of voices to the advance which has been made in practical economics. And yet, strange as it may seem, nearly all these advances have been accomplished only through the persistence of certain abstract theories or sentiments at first but ill received, or received with indifference, by the very classes of persons for whose benefit they were originally designed.

With this advance in knowledge there has gone along a parallel advance in education; that is in our methods of imparting what knowledge we have and of prompting the desire for more. Even the clergyman must spend eight to ten, and never less than six, years in careful preparation for the easy task of preaching a half hour sermon once a week on any subject. The physician and surgeon, who learned his profession a century ago by washing the doctor's wagon, must spend today from six to ten, and never less than four years, of careful preparation in the very best schools and under the very best teachers his means can afford. There are as many graduate students in our colleges today as there were undergraduates a century ago. The college graduate is as familiar today as the high-school graduate at that time. Illiteracy almost universal a century ago is now almost extinct in all the enlightened communities of Europe and America. A century ago, education was largely a narrow caste or close monopoly in the hands of the Clergy and the Law. Today college graduates may be found in every honorable occupation in life. Even the humblest occupations of life, like farming and cooking, are being made subjects of very careful scientific research. We have come to realize that what is worth doing at all is worth doing well and that whatever would be done well requires thorough education in the doing of it. Literature and science at last begin to shed their radiance and their light even into the cottages, and we may be perfectly certain that society having once received this

impulse will never cease until it shall have placed in the hands of every man and of every profession of men the very best means at its disposal for the attainment of personal culture and professional success.

But while the advance has been going steadily and swiftly forward in almost every branch of human knowledge, there is one branch in which, we fear, no marked advance has been made, except indeed in a very few favored communities. That branch of knowledge is English Law, both Case Law and Statute Law. In this perhaps the most far-reaching, fundamental and vital of all branches of knowledge we fear no true advance has been made. The legal profession is relatively at least a much less learned profession today than it was in the days of Coke and Bacon. Indeed in the days of Coke and Bacon it was perhaps the most learned, while today it is possibly the least learned of all the noble professions. And yet the legal profession is everyway founded upon learning. It is more than any other branch of knowledge founded upon the reading and study of books and written documents. The whole life of the true lawyer is essentially a life of learning, of wide learning, of learning to know, and to express what he knows in clear effective words, both spoken and written. Gentlemen, our inheritance and our professional dignity are at stake.

About one hundred and sixty years ago a lawyer by the name of Viner decided that English law was worthy of a place in the university classroom and so he endowed a chair of English law in Oxford. One would have thought that the results of that experiment would have proven for all time the truth of Viner's conviction, for that endowment produced Blackstone's Commentaries on the Laws of England. After Blackstone's time, perhaps because he did his task too well, his work fell into desuetude. About one hundred and twenty years later the beloved and revered Sir Roundell Palmer, after Lord Selborne, tried to restore to its ancient and honorable inheritance what he then described as "The shameful condition of legal education in England." For some reason, known, I suppose, only to the tender heart of the Almighty, he incurred the hostility of the benchers. Not to be outdone, Palmer went so far as to introduce a bill into Parliament providing for a thoroughly equipped School of Law in the Inns of Court in London. The bill was defeated by the unlucky majority of thirteen owing to the indifference of Mr. Gladstone. Palmer then went to the Woolsack where any further effort in this direction

became impossible. A similar and partially successful attempt was made in the same direction twenty years later by Lord Justice Lindley. Excellent work of the right kind has been done in recent years by Mr. Dicey, Sir Frederick Pollock and Sir William Anson. But legal education is still in a very backward condition in the mother country. When I was there two years ago I had the pleasure of meeting some eminent practitioners and legal students and I asked them the question, Why does not the Bar of England officially recognize the work done in the law schools in the English universities. I received substantially the following answer: "We do not attempt in England, as you do for example at Harvard, to give a complete professional course in law to our students. English law is taught but most of the time is spent in the study of Roman law, civil law, international law, constitutional history and theory and general jurisprudence. Our courses are designed not only for intending practitioners but also for ambitious young lawyers who may wish to take the work as a branch of liberal education." That answer confirmed my conviction of a truth which I had already known, and that truth is this, that both in England and in Canada the fault is not with the bench nor with the benchers, nor with the bar, nor with the offices, but with the law schools themselves. A poor law school, a half law school has no professional *raison d'etre*. Unless three years at the law school are worth for the practice of a lifetime at least as much as five or six years in an office, the law school is a waste of time and money. Nothing but a first-class law school can justify its existence professionally, however valuable it may be as a department of general liberal education.

Prompted by the success of Viner's experiment, another lawyer, Dane by name, undertook to repeat the experiment in America and endowed a chair of English Law in Harvard University. One would have thought that the result of Dane's venture would have proved the truth of his conviction for all time to come on this side of the water, for that endowment produced Story, the Blackstone of America. After Dane's time his work also languished. In recent years his spirit has revived in Langdell, Ames, Thayer, Gray, Holmes and others with the result that the Harvard Law School soon became and is probably today the leading school of English law in the world. The example of Harvard has been followed by Columbia, Cornell, Michigan, Chicago, Leland Stanford and about a score of other universities in the United States, and it is safe to say that, had it not been for the co-ordinating influence of these great teachers and centers

of legal learning, the fabric of English case law might long before this have fallen into hopeless mass of ruins in that country. Indeed there are some who think that it is already a heap of ruins notwithstanding their labors. But we must search deeper for the cause or causes of the backward condition of legal education to-day.

The English law began in a small community in and around London. In those early days the legal profession was little more than a close fraternal society. The members of this society met together in chambers, in court, in the inns of court, in the clubs and on the circuit, and as a result of this camaraderie a professional consensus of opinion sprang up which afterwards became the distinctive feature and vital principle in our English system of law and equity. The legal profession, including both practitioners and students was in those days nothing more nor less than a school of law of the type then prevailing in all the learned professions. Now, however, that the English system has been adopted by the people, occupying about one-third of the surface of the earth, and is administered in nearly one hundred distinct and separate jurisdictions, each one of which is somewhat absurdly supposed to be making law for all the others, this fraternal consensus of opinion is no longer possible. Hence the absolute necessity of providing some uniform system of legal education in all the leading communities who follow the English system. Meanwhile the very vital principle of the system is in jeopardy. This difficulty is not felt so keenly in England for the simple reason that the English practice seldom goes beyond the authority of its own courts. Even the decisions of the courts of common law and equity in Ireland are only respected by the English courts, while the Scottish courts administer a system entirely their own. It is not so keenly felt in British colonies other than Canada which follow the English system for the simple reason that these courts seldom go beyond the authorities of their own local courts or the authorities of the English courts from which these local authorities were originally derived. It is in Canada, and more particularly in Western Canada, that this difficulty is felt most keenly, for we have here, for some reason or other, got into the habit of consulting, or at least attempting to consult, not only our own local authorities but also the authorities of the other Canadian provinces, of Ireland, of England and even of the more than 40 separate states in the American Union. The task is impossible, the attempt absurd. This huge mass or conglomerate of authorities is clearly even now more complex and chaotic than the original and economic facts

of human life and organized society which they are designed to illuminate and to set in order. Nevertheless the process of accumulation goes on in strictly geometric progression. A fully equipped library is now beyond the means of even some first-class practitioners. The result will soon be that even our indexes, digests and encyclopedias of law will have become so numerous and so ponderous that it will require many days of labor and expense to trace down even the rough and unreliable indications which they may contain on any particular question of law. To mine from this huge mass of quartz and rubbish the few grains of pure gold which it may contain is a task which surely requires the most thorough legal training and legal skill which the human intelligence can command. To expect a high school student with three or four years of service as an attorney's clerk to even begin to master it is unreasonable. Perhaps by way of local coloring we should also add that this task of maintaining a consensus of legal opinion is made doubly difficult in Western Canada by the fact that we have lawyers practicing from every part of the English speaking world. English lawyers, Irish lawyers, Scottish lawyers, lawyers from Quebec, lawyers from Ontario, lawyers from the Maritime Provinces, lawyers from the United States. I even know one lawyer from New Zealand and another from Natal.

Or let us look at the problem from a slightly different angle. What is needed is a practical working consensus of legal opinion in the community. The law is not what it is. The law is not what it ought to be. The law is what the consensus of legal opinion in the community believes it to be, first the judges, next the lawyers, and finally the mass of intelligent laymen who direct the organized activities of the state. Create this consensus of legal opinion and you create the state; allow it to perish and peace, good order and good government must perish with it.

If we now turn from case law to statute law we meet the same problem. Our statutes are admittedly largely the result of haphazard. Popular legislatures may be indispensable safety valves in the government of a modern state. They no doubt too, serve the necessary purpose of bringing popular opinions and sentiments to a common centre. But when the real practical test comes of shaping these opinions and sentiments into effective legislation, there is only one man in the community who can even so much as pretend to attempt the task and that man is the lawyer. Statute law is as much a creation of the judiciary and the lawyers as case law. All

statute law must run the gauntlet of legal argument and judicial interpretation. The Statute of Frauds was ostensibly made in the reign of Charles II; it is really in process of being made every day in every court of law in the British Empire and in the United States. No statute is final until it receives the imprimatur and approval of the courts. The legislature enacts the words, the courts enact the meaning. The words are nothing, the meaning is everything. As legislatures tend to become more popular and progressive the courts tend to become more technical. As miscellaneous legislatures tend to become more careless and more self-willed in the drafting of statutes, so the courts tend to become more severe and sometimes more selfwilled in interpreting them. On the other hand the courts clearly cannot do for the legislature what the legislature has failed to do for itself. Only the declared will of the legislature becomes law. The courts must, no doubt, interpret the statute so as to carry out the intention of the legislature, but they must find that intention in the actual words of the statute itself. As words in themselves, however, being mere written symbols and not realities, have little or no meaning, so their natural loose meanings necessarily tend, under the constant criticism of the courts, to approach the vanishing point. Furthermore the legislature must not only declare its intention; it must also provide the necessary legal machinery, if none exists, for carrying that intention into effect. The simple omission to provide a penalty, or a necessary form, or a necessary presumption of evidence may render the whole enactment impracticable. Hence a great deal of statute law sound in principle and bad in practice, and legislation sound in principle and bad in practice, being only a trap for honest men, is the worst form of all forms of legislation. Hence too, a serious and long standing warfare between the legislature and the judiciary. This warfare has become so acute in some places as to have given rise to a widespread agitation for the recall of judges. But the fault is not with the judiciary. The fault is in the system. It is the old problem of the separation of the powers. Some institution is needed in the state which will act as a buckle or a link of sympathy between the legislature and the judiciary in the way in which the cabinet for example, acts as a buckle or a link between the legislature and the executive under the British system of Parliamentary Government.

To expect the clerk or apprentice to grapple successfully with the difficulties of the English system both of case law and statute law is impossible. If the clerk or apprentice system is sound, then the whole

fabric of our modern methods of education is a sham. So long as our law students are allowed to gather their legal knowledge scrap by scrap in the hundred different offices in which they serve their time, no consensus of legal opinion and honor is possible. The clerks in the offices spend most of their time doing clerical work which they will not do for themselves but which they will require their own clerks to do for them when they themselves begin to practice. The result is a profession of apprentices without principals. These clerks receive absolutely no instruction and scarcely any assistance in their work. If once and again they are delegated to gather law on some matter in litigation they only succeed in gathering information which is wholly one-sided and misleading for purposes of impartial and effective legal advice. The only studying they do is during tired after hours by reading legal text books or hand books, most of which are so condensed and the number of authorities cited so great and so confusing that thorough study is wholly out of the question. This system may possibly produce collectors, conveyancers, money lenders and real estate dealers, but it cannot produce lawyers. Clearly this system is only designed to degrade the profession into the position of a mere stepping stone for purely mercenary ends.

From what we have already said it is evident that two things are necessary, viz.: legal research and uniform legal education, based upon the results of research. I need not stop to point out that these are just the two functions of a modern college or university. Happily, too, the task is easier, less expensive, and I believe more inviting in English law than in any other branch of study. No department of study has ever presented a prettier field for research and for lively classroom teaching than English law. Most of the material sources of English law are mere repetition, much is clearly erroneous, much has been definitely overruled and, despite what is said to the contrary, the main framework of the original edifice still remains intact. All that is needed is a small body of learned and forceful men in each community who will apply themselves to the task of research and instruction.

I believe that we should have in Canada a system of provincial law schools, at least one in each province, and that these schools should follow as nearly as possible the same courses of study and similar methods. There is no other way in which a uniform standard of legal opinion can be effectively provided. Such an institution is an essential part in the organiz-

ation of every well governed community which follows the English system. The survival of the very vital principle of the system, viz: a professional consensus of opinion and a professional esprit de corps depends upon the existence of such an institution. We might, I believe, profitably spend upon these schools as much as we now spend upon the judiciary, and be it said, we ought to spend at least twice as much upon our judiciary as we now do. The financial saving alone which such a system would effect, by reducing the costs of unnecessary litigation and by providing a uniform system of legal opinion and practice in the courts, in the law offices and in the general conduct of business in the community would more than pay for the maintenance of these schools a hundred times over. If all our law students were thoroughly drilled in such a system of schools, there would, we believe, be an end of at least one-half of the present large amount of annoying and badly conducted litigation which encumbers the work of our law courts in Western Canada. There would also be, beyond any doubt, a great gain in that other most necessary and desirable of all things in the lawyer, namely, professional honor. There is no stronger social tie of honor than that which binds together the different alumni of one honored and respected Alma Mater. A liberal infusion of this spirit into our different law societies is to say the least, desirable. I see no reason, too, why this system should not produce a substantial increase in our own professional incomes. While we should do less work, we should be able to do it better, and by doing it better, to charge higher fees. After all is said, a high scale of fees is necessary in every system of law, both for the purpose of supporting the profession and for the purpose of preventing needless litigation.

There are two classes of law schools, which I shall call the Independent class and the Auxiliary class. In the Independent class the student is expected to devote all his time during term to the work of the class room and to private study. The Auxiliary system is designed to complement the clerk or apprentice system. During certain hours in the day students are permitted to leave the offices and to attend lectures in the neighboring law school. The Auxiliary system, therefore, calls for a law school in every city and centre where any considerable body of students are found and is for this reason alone impracticable. It is also clearly unfair both to students and offices residing in small towns. The system, moreover, does not do justice to the student. Owing to pressure of work in the offices lectures are often irregularly attended. Study, as in the apprentice system,

is only possible during tired after hours, and when we remember that each lecture to be properly appreciated and mastered, requires at least three hours of private study, the time element alone shows that this system must be incapable of producing thorough results. The net result is that the student instead of systematically reading and digesting his text books and cases from day to day, crams up his lecture notes in the usual manner a day or two before the day fixed for examinations. The auxiliary system is, no doubt, an appreciable improvement on the pure apprentice system, but it is at best only a half measure. A thorough professional college course in law is abundantly worth the student's undivided attention while he is engaged in it. And, on the other hand, if the student is to get and to give satisfactory results during his period of clerkship, he should devote his undivided attention and continuous time to that part of his training. Personally I hold the opinion that at least two years of busy and continuous service in an office in addition to a college course is indispensable for purposes of admission and call.

There are two systems of instruction followed in law schools. These two I shall call the lecture system and the case system, or the civil law system and the English law system. Under the lecture system the instructor devotes his time almost exclusively to systematic lecturing and the student to study of his lectures and text books. Under the case system the student devotes his whole time to the reading and study of numerous leading cases selected from the reports and the instructor to the discussion of the cases in open conference in the class room. Of these two systems, the case system is undoubtedly superior. Both systems, however, are to my mind one-sided. The lecture system is too abstract and formal; the instruction which it gives lacks the necessary content and concreteness; while under the case system the content is too extensive and confusing, especially for the beginner. The lecture system accomplishes too little, the case system sometimes tries to accomplish too much. The lecture system is superficial, the case system tries to be thorough but often only succeeds in becoming laborious. On general principles, therefore, the best system would be based upon the case system, that is upon a thorough study by the student of select leading cases, complemented by illuminating discussions and lectures and by selected readings, where available, from reliable text books of recognized value by such authors as Anson, Pollock, Odgers, and other great names in law in our British temple of honor.

I believe, too, that both of the above systems are inadequate for purposes of thorough professional training. The legal profession is not only a learned profession; it is also a skilled profession. Every full course of three years' study should have at least one class in each year in the mechanics of legal draftsmanship. The course in contracts should be complemented by a course in drafting forms of contract and contract clauses adapted to current business conditions in the community. The course in real property should be followed by a short course at least in the mechanics of conveyancing. The course in company law should be complemented by a course in drafting company forms, forms of incorporation, of minutes, of by-laws and of special forms of company agreements. The course on procedure should be based on a minute study of the authoritative forms of practice in the light of the prescribed rules of practice and the leading cases on that subject. In few words, the student should leave the law school in full possession, both manually and intellectually, of a fairly large collection of typical forms of documents which he could begin immediately to use in his practice with the help of the standard works on forms and precedents with which by this time he would be at least on friendly terms.

Lastly, both the lecture and the case system of instruction tend to overlook the importance of statute law. Nearly one-half of our law is statute law and the proportion is growing larger every year. It may surprise some of you to realize that there are about forty statutes of the Imperial Parliament which extend to this province under the provisions of The Colonial Laws Validity Act of 1865, not to mention a much larger number which we have received by inheritance. I could point out several western cases in which the provisions of one or more of these statutes have been clearly overlooked. Needless to say our Dominion and provincial statutes should be combed over carefully. Very interesting and useful provisions may often be found in the oddest corners of the statutes. It will require at least two full courses of study to give the student a sense of familiarity with all these statutes and the leading cases bearing upon them. But, you ask, will not all this thorough instruction require a great amount of work? It will require a great amount of work for the staff of instruction, but only the most competent men should be chosen for that task. For the student it will require three terms of eight months each, and I do not think that a sound knowledge of law can be gained in any less period of time.

Now, I am sometimes asked, is an arts course advisable before beginning the study of law. I should say not, if the student has already reached the age of twenty years. At that age he will find abundant opportunity for study in the law for many years to come. An arts course, if properly appreciated, is no doubt a thing of beauty and adds greatly to the value and enjoyment of life, but it is not really of any great value professionally. I speak modestly, but with the knowledge of one who spent eight university years of study and three university years of teaching in the liberal arts and sciences. As a matter of experience indeed I should say that a legal education is the most liberal of all branches of education. For mere purposes of personal culture, I should prefer the degree of Bachelor of Laws to the degree of Bachelor of Arts. It touches real human life at more vital points. As a sharpener of the intellect legal education is easily first. The literature of English law contains the elements of nearly all branches of human effort, blended together in the exact proportions in which they occur in real life. The reported decisions of great English judges present the most fascinating and perfect picture of the human mind struggling with all its strength and all its weakness to grapple somehow with the ever living facts of human success and human failure.

Another question often asked is how closely the law department in the university should be associated with the arts department. To this question I should answer, not too closely. The temper of an arts school is very different from the temper of a professional school. There is undoubtedly a great amount of dilletantism and intellectual play in our traditional arts courses. After all an arts course is a sort of preliminary canter in life. But a law course is a serious matter. An arts course is intended for boys, a law course for men. The law is a jealous mistress.

I have never been able to understand fully the niggardly provision which most of our institutions of learning make for the study of English law. Our government and private institutions will spend thousands on the education of the engineer while refusing to spend hundreds on the education of the lawyer. And yet every properly organized community will always need at least four lawyers for every single engineer. The cost to the institution of a law course per student-year is not one-quarter the cost of a course in arts and science, or medicine or engineering. An additional fifteen thousand dollars a year, necessary to equip a good law school, would scarcely be noticed in the annual budgets of our leading

universities. I have ventured the statement that legal education is the most vital to the community of all forms of education and the statement is not hard to justify. The lawyer's office is unquestionably the most important office in the community, and that for the obvious reason that the lawyer is really the only man in the community who really makes it his business to understand the delicate and complex organization of government and law by which the community directs its activities for common ends. I have already mentioned some of the advances which have been made in recent years in practical economics and government. Even the lay mind can see at a glance that these advances are almost wholly creations of the legal profession. All the projects, hopes, fears and plans of financiers, captains of industry and statesmen are only so much raw material until legal machinery is devised and set up by which they may be turned to account for human uses. All our institutions depend implicitly upon their solicitors to guide them in every new venture, and upon counsel to deliver them from any dangers which they may encounter. In the last analysis every simple contract made between private individuals is wholly a matter of law. The state itself is an edifice constructed solely out of legal material. It is literally made of law. If two men cannot agree together as to what is just and fair between them there is only one thing that they can do and that is refer the matter to some third person on whose wisdom and integrity they both rely. That is, to go to law about it.

We sometimes forget, I fear, that law and law courts are based upon the principle of arbitration. If then legal education is so vital to the community, the community certainly cannot be excused from neglecting it. This is particularly true in the new western land where for better or for worse we are laying the foundations of a system of law and government upon which the peace, happiness and welfare of all those who come after us will largely depend. I have tried to make a plea for more and better legal education. Perhaps if I keep on pleading long enough my prayers may some day be answered.

Mr. Hugill kindly supplied us with the following brief commentary on the above address in which he emphasizes the significance of its central thesis—in turbulent 1941.

M. M. M.

HAUD OBLIVISCENDUM—HOC TEMPORE

"The State itself is an edifice constructed solely out of legal material. It is literally made of Law."

This simple statement of fact is to be found in an address, "The Education of a Lawyer," delivered to the members of the Alberta Law Society at the Third Annual Meeting, held in Calgary, December 18 and 19, 1913. The late Ira A. MacKay, M.A., Ph.D., LL.B., led up to the conclusion that "Legal education is the most vital to the community of all forms of education." The approach to the subject from a background of philosophy was *ipso facto* the more convincing—if conviction *were* necessary. In any event the address was opportune. It heralded, if not hastened, the arrival of a Law Faculty in the University of Alberta. We have for some years now been able to take pride in our own Law School.

The Rule of Law.—Convinced of the primary importance of the subject in our national life, we approach our politics through the legal avenue—are we mindful enough of the *noblesse oblige* of the profession? What are we doing severally and collectively about our place in the communities we serve? If "the law is what the consensus of legal opinion in the community believes it to be," what are we students of law doing to create this "consensus of legal opinion"? Respect for our constitution is the very foundation of national unity. An entity depending upon courage and fortitude, in large measure, for its political health, preservation and growth. Law, in essence, is the true friend of an Anglo-Saxon democracy. It is our own creation—the implacable foe of dictatorships. We are a people conscious of our rights.

Political Health.—That the legal profession is being called to account repeatedly is evidence of some doubt in the minds of intelligent laymen as to our place in the community.

"I have been moved of late to wonder whether the legal profession in Canada is performing all the services which can reasonably be expected of a profession—responsible for one of the great tasks of national preservation —the task of preserving the political health of the nation. It is a task to be pursued not alone by lawyers individually, but also by the Bar collectively" (1).

Is it not time we were at some pains to dispel this doubt?

The Rowell-Sirois Report.—It is submitted with much respect and in the spirit of *amicus curiae* that we have a monumental work to jump-off from

upon a "constitutional" education pilgrimage. No longer need we be dismayed by the difficulties of divided jurisdiction (more apparent than real). Plotting the line of division should be nothing less than *labor ipse voluptas*. Fortified by re-affirmation in our highest tribunal—the right to be heard, to have the legality of the law tested by judicial process in the courts of our land as fundamental to the whole concept of the constitution—surely we can supply the courage and the fortitude necessary to continue the building of this Canadian edifice upon the true lines laid down by its founders. In their spirit "to direct the unrest of our times into constructive and away from destructive channels," the acknowledged task of statesmanship today and the birthright of the lawyer.

We shall revere the spirit of the "Fathers of Confederation" the more as we earnestly partake of the fruits of labour of those distinguished and learned members of the Royal Commission and the many who contributed to the value of the Report now available to us.

It is significant that the early part of Book I is devoted to the historical aspect of and the legal incidents pertinent to the Constitution. The reading of his part alone impels its acceptance as a basic community study fundamental to any real conception of our "national entity."

The Statute of Westminster simply recorded the developed state of our relationship. We had arrived at the stature of nationhood. As in Browning's lines:

> Justinian's Pandects only make precise
> What simply sparkled in men's eyes before.

The Supreme Court Act.—The question whether the Parliament of Canada has jurisdiction to pass an amending act abrogating jurisdiction of the Privy Council to hear appeals to the Judicial Committee from Canadian Courts has been answered in the *affirmative* following a reference to the Supreme Court, June, 1939 (2). It is hardly conceivable that circumstances will arise impelling such enactment until the conclusion of the present world conflict. It is reasonable to anticipate the amendment in natural logical sequence.

Since its inception as a Province, Alberta has contributed much to the elucidation of constitutional law—perhaps unwittingly! We do know the real meaning and purpose of much in our written constitution (British

(1) B. K. Sandwell, "Lawyers and Liberty," Saturday Night, Nov. 30, 1940.
(2) In re S.C. 1940 S.C.R. 49.

North America Act) that *prima facie* seemed ambiguous and obscure. The frustration of various legislative experiments has not been altogether purposeless if we are thereby the better informed legally and can import that information, with certainty as to its soundness, to develop a community legal sense.

Many of those who well and truly laid the foundation of our Law Society have passed on. Survivors of the meeting with which reference this brief commentary began, remain undaunted and still go forward breast high and with heads unbowed. To the younger and so more virile students of the law, the torch will go to lighten the way and perhaps add more to the myriad of precedent. Latin for Lawyers condenses a thought in a familiar maxim, *suppressio veri, suggestio falsi!* That is the value of the Law—you cannot suppress the truth of it, if you would. Make of it a falsehood—never: *Magis amica veritas.*

When, perchance, discouraged with the seeming futility of effort, some comfort may be found in the thought Sir Walter Scott bequeathed through the mouth of Redgauntlet:

"The privilege of free action belongs to no mortal—we are tied down by the fetters of our duty—our mortal path is limited by the regulations of honour—our most indifferent actions are but meshes of the web of destiny by which we are all surrounded."

Trusting the genius of our University, we may share and strive mightily with the tasks inseparable from our national destiny, as things not to be forgotten at this time.

John W. Hugill, K.C., D.C.L.

THE MODERN EXTENSIONS OF THE RULE IN M'ALISTER v. STEVENSON

This paper endeavors to bring *M'Alister v. Stevenson* up to date with special reference to:

(1) The type of article manufactured.
(2) To whom the duty is owed.
(3) By whom the duty is owed.

In *M'Alister v. Stevenson* (1) the defendant manufactured ginger beer and sold it to retailers in opaque bottles. The plaintiff's escort treated her to a drink of the defendant's brand and she became ill because the bottle from which she drank happened to contain a decomposed snail. The House of Lords by a three to two majority, decided that the defendant owed a duty to exercise care in manufacturing and bottling the ginger beer. Lord Atkin at page 599 states what he conceived to be the circumstances upon which the duty was based:

> "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or the putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

I.—The Type of Article Manufactured.

From what Lord Atkin said elsewhere in his judgment it would appear that the rule as originally laid down was to apply only to article of common household use such as food, medicines (both internal and external) and the like.

In 1936 the Privy Council in *Grant v. Australian Knitting Mills* (2) brought clothing (underwear) within the orbit of the rule. This precluded forever the possibility that the doctrine would be confined to foodstuffs or medicines. In that case the manufacturers of the underwear were held liable to the plaintiff who contracted dermititis because certain chemicals were left in the garment as a result of the defendant's negligence. The defence raised was that the *M'Alister v. Stevenson* doctrine

(1) M'Alister v. Stevenson 1932 A.C. 562.
(2) Grant v. Australian Knitting Mills 1936 A.C. 85.

applied only to food and drink to be consumed internally. However, Lord Wright said that no distinction could be drawn between "a noxious thing taken internally and a noxious thing to be applied externally."

It was in this case too, that Lord Wright pointed out that the decision in the *M'Alister* case did not in any way depend upon the bottles being capped: the purpose behind this inaccessibility was to insure the consumer that he received the article containing the defect it had when it left the manufacturer. While extending the principle in this fashion, he restricted its application to those cases where the facts indicate that the consumer did not know at the time of purchase of the hidden defect.

The extension of the rule toward articles of a mechanical nature was attempted in the case of *Farr v. Butters Brothers and Company* (3). The facts of that case were briefly that a crane erector, after marking certain essential parts of a crane as being faulty (as was his duty), started up the machine and was killed when it collapsed on him. It was held that because these defects could be discovered on reasonable inspection, the manufacturers owed the deceased man no duty. On this ground it was said that *M'Alister v. Stevenson* did not apply. However, Lord Justice Greer, while concurring with this distinction, said he believed that the rule in *M'Alister v. Stevenson* might carry a decision in the favor of a plaintiff workman where the manufacturer has put on the market, with the knowledge that it is going to be used by workmen, a machine defective in construction in a way that no reasonable examination can be expected to discover.

An attempt was made in the case of *Evans v. Triplex Glass* (4) to apply the rule to the manufacturers of a safety glass. The King's Bench Division held, however, that *M'Alister v. Stevenson* did not apply because the plaintiff failed to prove negligence on the part of the defendant.

The cases cited thus far serve only to show a few of the extensions of the doctrine to articles other than food and medicines. Some other extensions may be found in *Herschthal v. Steward and Arden Limited* (5) (automobiles); *Kuback and Another v. Holland and Another* (6) (chemicals in a school laboratory); *Dransfield v. British Insulated Cables Limited*

(3) Farr v. Butters Brothers and Co. 1932 (2) K.B. 606.
(4) Evans v. Triplex Safety Glass 1936 (1) All E.R. 283.
(5) Herschthal v. Steward and Arden 1939 (4) All E.R. 123.
(6) Kuback and Another v. Holland and Another 1937 (3) All E.R. 907.

(7) (overhead trolley); *Malfroot and Another v. Noxal* (8) (motor cycle sidecar), and *Stennett v. Hancock and Peters* (9) (lorry).

II.—To Whom the Duty is Owed.

In the case of *Stennett v. Hancock and Peters* (9), in the King's Bench Division, the question arose as to the duty of a repairer of a lorry to a pedestrian walking along a highway who was injured when the wheel of the lorry came off due to the negligence of the repairer. It was held that the element present in *M'Alister v. Stevenson* (1) which made the manufacturer liable to the consumer, was present here so as to make the repairer liable to the pedestrian.

The case of *Malfroot v. Noxal* (8) which was a similar decision in the same court, made the repairer of a motor cycle liable to the passenger of the owner who was injured when the sidecar became disengaged through the negligence of the repairer.

In *Barnett v. Packer* (10) a confectioner was held to be entitled to damages from the manufacturer of candy when he was cut by a piece of steel which found its way into the candy in the process of manufacture. The plaintiff in this case was transferring the sweets from a box to a window tray.

These cases decide that the benefit derived from the doctrine of *M'Alister v. Stevenson* is not restricted to the consumer alone, but extends to anyone who is injured through the negligence on the part of a manufacturer or repairer.

III.—By Whom the Duty is Owed.

The cases of *Stennett v. Hancock and Peters,* and *Malfroot v. Noxal* (supra) indicate that the doctrine of *M'Alister v. Stevenson* has not been restricted in its application to manufactures alone. In these cases a repairer of an article is shown to have the same duty toward anyone using or consuming the article as the manufacturer has.

The application of the rule was again enlarged in the case of *Watson v. Buckley, Osborne, Barett and Company Limited and Wyrovoys Products*

(7) Dransfield v. British Insulated Cables Limited 1937 (4) All E.R. 382.
(8) Malfroot and Another v. Noxal (1935) 51 T.L.R. 551.
(9) Stennett v. Hancock and Peters 1939 (2) All E.R. 578.
(10) Barnett v. Packer and Company 1940 (3) All E.R. 576.

Limited (11), in which the King's Bench Division decided that the distributor of a hair tonic which has proven to be a dangerous thing, was liable to the consumer who was injured when he used it. A duty was established by applying the rule in *M'Alister v. Stevenson.* Stable, J., said at page 183.

> "I do not know that it matters whether the man is a manufacturer or whether he is a distributor. It seems to me to be the same in the case of a person through whose hands there has passed a commodity which ultimately reaches a consumer to his detriment. Where that person has intentionally so excluded interference with, or examination of the article by the consumer, then he has, of his own accord, brought himself into direct relationship with the consumer so as to be responsible to the consumer for any injury the consumer might sustain as a result of the distributor's negligence. The duty is there."

It would appear from the cases cited that as the rule now stands, not only is the manufacturer who is negligent, liable, but also any repairer or distributor who has not exercised reasonable care.

It is worth while noting at this point that the *M'Alister v. Stevenson* doctrine is not applicable to real estate. This was decided in the case of *Otto and Otto v. Bolton and Norris* (12). In that case the one plaintiff bought a house from the defendant who warranted it to be absolutely safe. It was attempted to make the defendant liable on the *Donoghue* rule when the house collapsed injuring the other plaintiff who was not a party to the contract. The court, however, decided that this doctrine had no application to real property.

In the case of *Herschthal v. Steward and Arden Limited* (5), the question discussed is whether in applying the rule in *M'Alister v Stevenson,* it is an adequate defence that there was a sufficient opportunity for an intermediate inspection of the article sold, or whether in addition to this opportunity, it is also essential that the parties anticipated that there would be such examination. This problem is discussed by Mr. Williamson in this issue.

S. V. Legg.

(11) Watson v. Buckley, Osborne, Garrett and Co., Ltd., and Wyrovoys Products Limited 1940 (1) All E.R. 174.

(12) Otto and Otto v. Bolton and Norris 1936 (1) All E.R. 960, and see "Liability of Builder in Sale of Newly-Constructed House: Otto v. Bolton," by M. H. Montgomery in Alberta Law Quarterly, Vol. II. p. 260.

"We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions."

"If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop."

With these remarks two prominent judges of their time refused to consider the plaintiff's action in the case of *Winterbottom v. Wright* (1). The defendant had contracted with the Postmaster-General to keep in repair certain vehicles used in carrying the mail. The plaintiff, a mail carrier, was injured when a wheel came off one of these vehicles, throwing him to the ground. He alleged that the breakdown was caused by the defendant's failure to keep the vehicle in repair.

That was ninety-nine years ago.

The stand taken by Lord Abinger and Baron Alderson remained almost unshaken for ninety years. It was not possible for a person to recover damages for an injury arising out of the breach of a contract to which he was not a party (2). Then, in the case of *McAlister* (or *Donahue*) *v. Stevenson* (3), the House of Lords by a bare majority expressed the view that a plaintiff might recover where the breach of the contract involved the breach of a duty to exercise care owed toward the plaintiff. The doctrine, as applied to the facts of the case, was expressed by Lord Atkin in these words:

> "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer owes a duty to the consumer to take that reasonable care" (4).

After a century of shivering on the brink of a flood of possible litigation, the plunge was finally made.

It is too soon to determine whether or not the apprehensions of Lord Abinger and Baron Alderson were well grounded—too soon to envisage the

(1) (1842) 10 M. & W. 109.
(2) Earl v. Lubbock 1905 1 K.B. 253.
(3) 1932 A.C. 562.
(4) 1932 A.C. 562 at p. 599.

full significance of the *M'Allister Case.* No one will deny that the new concept of delictual liability has a great significance in the English law of tort. It is not our purpose here to evaluate the influence of the *M'Allister Case;* neither is it proposed to criticize nor to approve of its doctrine. It has been accepted and followed in the English courts and it is in connection with the application of this doctrine that we consider three cases, lately decided in England on the basis of their being squarely within the scope of the *M'Alister* doctrine.

The case of *Stennett v. Hancok and Peters* (5) affords an excellent starting point. The defendant Peters was a motor car repairer who had repaired and replaced a wheel upon the lorry of the defendant Hancock. A few hours later, while the lorry was being operated, the wheel came off, rolled along the road, and struck the plaintiff, causing her injury. Bransom J. held that the defendant Hancock was not liable since there was no negligence in his failure to inspect the completed repair. He was entitled to rely on the ability of Peters as a competent repairman. However it was held that the defendant Peters was liable—on an application of the doctrine of *M'Alister v. Stevenson* (4).

Several unusual and interesting considerations are raised by this case. We see that repairers of articles are included in the class to which liability, within the *M'Alister* doctrine, will attach. Again the learned judge apparently considers that an opportunity of intermediate inspection alone will not relieve a negligent repairer from liability under circumstances in which the other party to the contract of repair is entitled to rely on the proficiency of the repairer. This raises an important point. In this case it is clear that the plaintiff would have neither interest nor opportunity to make an inspection. If we accept the decision that this case comes within the ambit of the *M'Alister doctrine* (4) it is at once apparent that the "possibility of intermediate examination" therein referred to

(a) is confined to examination by the injured party, or in the alternative

(b) may, in certain circumstances be present without relieving from liability the negligent contractor.

This problem will be dealt with later in more detail.

We also find that the class to which a duty is owed has been greatly extended. The plaintiff in this case was in no sense of the word a consumer. Nor was the plaintiff a user of the article. Liability seems

(5) 1939 2 All E.R. 578.

to have been extended to any member of the public who may be injured by the negligently repaired article.

Herschthal v. Stewart and Ardern, Ltd. (6) is a case worthy of consideration as having been decided on the *M'Alister* doctrine (4). The defendants, a firm of motor car engineers and distributors, sold a reconditioned Morris car to a limited company of which the plaintiff was a director. To the defendants' knowledge the car was to be used by the plaintiff in carrying out his duties as director. The plaintiff had driven the car only a few miles when a wheel came off, due (it was found) to the fact that the wheel-nuts had not been tightened. A serious accident was narrowly avoided, and the plaintiff sued the vendors of the car claiming damages for shock.

Mr. Justice Tucker based his judgment for the plaintiff on a relationship between the parties which he held to come within Lord Atkins' definition of "neighbor in law" (7); and on a finding that the defendants had delivered to the plaintiff a dangerous article for his use,

> "In circumstances in which they did not anticipate and could not have reasonably anticipated that there would be any such intermediate examination as would be likely to reveal the defect" (8).

This quotation raises a question of great importance. The learned judge, after much deliberation, chose to accept as the test qualifying Lord Atkins' statement of the liability in the *M'Alister* doctrine, "the reasonable anticipation that examination would take place" in preference to the narrower test, "the reasonable possibility of intermediate inspection." In reaching this conclusion he was apparently influenced by the decision on the facts of *Grant v. Australian Knitting Mills* (9).

The most recent case decided on the *M'Alister* doctrine is that of *Barnett v. Packer & Co.* (10). There the defendant, a manufacturer of candy, had sold a seven-pound box of his candy to one Marino, a wholesale merchant. The plaintiff, a confectioner, purchased the box of candy from Marino. In arranging the display trays for his store window he removed a candy from the box with his hands. While doing so he received a scratch on his finger from a piece of wire or steel embedded in a piece

(6) 1939 4 All E.R. 123.
(7) 1932 A.C. 562 at p. 580.
(8) 1939 4 All E.R. 123 at p. 136 (c).
(9) 1936 A.C. 85.
(10) 1940 3 All E.R. 575.

of the candy. Blood-poisoning resulted. Mr. Justice Singleton applied the *M'Alister* doctrine and gave judgment for the plaintiff.

This case raises a peculiar problem. The candy was intended to be sold in small quantities from the display tray. If we suppose that one of the plaintiff's customers had bought a portion of the candy and was injured through eating the defective piece the case would at first appear to be on all fours with *M'Alister v. Stevenson*. There is this difference, however, that in our hypothetical case candy would have been handled by the confectioner—taken out of the container and repackaged. Would this constitute a reasonable opportunity for intermediate inspection?

The plaintiff's recovery in this case suggests that damages would be recovered even if the injury were received while the person was in the act of inspecting the article—the very act which would relieve the manufacturer from liability to persons more remote.

II.

A Criticism of These Three Cases.

In the *Barnett* case (10) Mr. Justice Singleton (referring to *M'Alister v. Stevenson*) made this observation:

> "In my view each such case ought to be carefully examined, and, in a case of this kind, it is my duty to see, in so far as I can, that the doctrine is not stretched at all, nor extended one inch beyond the length to which that case has gone" (11).

It is difficult to reconcile these three judgments with this statement of the nature of judicial duty.

On analysis, it is submitted that the *Barnet* case is a striking example of an application (probably unconscious) of the doctrine of *res ipsa loquitur*. The onus of proving that the injury did not arise out of a defect caused by his negligence was placed upon the defendant. In *M'Alister v. Stevenson* the very nature of the product precluded the defendant from explaining away the defect. The bottle, of necessity, remained sealed until it reached the consumer.

In the *Grant* case (9) it was proved that the harmful agent was used in processing the wool from which the garment was made. In the *Stennett* case (5) it was found as a fact that the repairer had not replaced the wheel correctly. In the *Herschthal* case (6) it was shown that the wheel

(11) 1940 3 All E. R. 575 at 577 (E to F).

nuts had not been tightened at the time of reconditioning by the defendants.

If it was necessary to prove the negligence of the defendant in these cases, it is difficult to agree with the method used to find this negligence in the *Barnett* case. Mr. Justice Singleton took the view that since the wire was in the candy, it followed that the manufacturer was negligent. This treatment of the problem of proof of any negligence diverges from the view expressed by Lord Macmillan in *M'Alister v. Stevenson* in these words:

> "The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the person whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim, *res ipsa loquitur*. Negligence must be both averred and proved" (12).

As the law appears to be the manufacturer will have little chance to escape liability if his products are dangerously defective. If his system of manufacture inspection is not fool-proof he is negligent, because he has failed to set up proper safeguards. If his system is proper, and a dangerously defective product leaves his place of business it will be inferred that one of his servants negligently failed to follow the system. In either case the defendant manufacturer will be found negligent.

In the *Stennett* case, it will be remembered, it was found that there was an opportunity of intermediate inspection, but the owner of the lorry being entitled to rely on the competence of the repairer was not negligent in failing to seize this opportunity. That is, there was no intervening act of negligence to interrupt the chain of cause and effect between the plaintiff and the negligent repairer. It is also clear that there was no opportunity afforded the plaintiff.

On the other hand, Mr. Justice Tucker in the *Herschthal* case after admitting that there was an opportunity for the plaintiff to inspect the

(12) 1932 A.C. 562 at 622. But see for different view of *Res Ipsa Loquitor* and the burden of proof, M. M. MacIntyre, "A Survey of Some Recent Canadian Cases on the Law of Evidence, 1 Alberta L.Q. 45, 49, 51, 52.

car, chose to apply as the test of liability the question as to whether or not an inspection could have been reasonably anticipated.

It is respectfully submitted that the learned judge in this case proceeded to extend the *M'Alister* doctrine by this view of the law. In order to substantiate this submission it is necessary to go behind *M'Alister v. Stevenson* and consider two previous decisions of the House of Lords.

In 1897 in *Caledonian Railway v. Mulholland* (13) it was held that there was no duty upon the defendant company to see that their cars were in proper order with regard to an employee of a second company to which the cars were delivered under an agreement. Thus no recovery was granted for the death of a workman arising out of a set of defective brakes on one of the cars while the cars were being operated by the second company.

In 1929 the House of Lords was faced with the necessity of distinguishing this judgment in *Oliver v. Saddler & Co.* (14), a case so resembling the *Mulholland* case that Viscount Dunedin said: "I find them similar with one, and one only, point of difference." The facts of the case before the House were these: the defendant firm of stevedores was employed to remove a cargo of grain in bags from the hold of a ship to its deck. From there the grain was transferred to the dock by a firm of porters who, as a matter of convenience, used the slings of the defendant firm, in which the latter had already placed the bags of grain. The ropes of the slings were in charge of a specially appointed member of the defendant firm. One of the slings broke due to defective rope and a member of the firm of porters was killed. Their Lordships found a duty on the defendants despite the prior decision of *Caledonian Railway v. Mulholland.*

The two cases were distinguished on the ground: in the earlier case there was ample opportunity for a defect in the cars to be discovered by either the defendant company or the second company of which the deceased was an employee; in the *Oliver* case the opportunity to discover a defect in the mechanism of the slings was confined exclusively to the defendant firm —there was no reasonable opportunity for inspection by the firm of porters, one of whom was the deceased.

(13) 1898 A.C. 216.
(14) 1929 A.C. 584.

In *M'Alister v. Stevenson* both of these cases are cited by Lord Atkin (15) and the distinction is made on the grounds stated above. Unfortunately the cases are not cited in juxtaposition and one is apt to lose sight of the important factor which determines how such cases are to be decided. It is respectfully submitted that these two cases demonstrate very clearly that liability will depend on the presence or absence of "a reasonable opportunity for intermediate inspection." There would be little difficulty in showing that this is the true and only test in applying the *M'Alister* doctrine if it were not for the case of *Grant v. Australian Knitting Mills* (9). At first sight the *Grant* case seems to support the contention that the test might be "a reasonable anticipation" that intermediate inspection should take place. It is submitted that on careful analysis there was no intention that the test should be so qualified. In that case, it will be remembered, the injury arose from the presence of a harmful agent used in the manufacture of the garments. No degree of inspection available to the user would have revealed the harmful agent. In other words, the inspection necessary to reveal it would not have been "reasonable".

The question is, then, one of fact as to whether the opportunity of intermediate inspection was reasonable; rather than one of law as to whether the true test is "a reasonable opportunity of intermediate inspection," or "a reasonable anticipation that intermediate inspection should take place." The latter test could well be applied in determining whether or not a person was entitled to rely on the ability of, for example, a competent repairer.

Now if we apply this reasoning to the *Stennett* case (5) it is clear that the decision is within the *ratio decidendi* of *Oliver v. Saddler & Co.* (14). There was absolutely no opportunity for the injured plaintiff to conduct an intermediate inspection of the lorry.

On the other hand, the learned judge in the *Herschthal* case (6) finds that there was in fact an opportunity of intermediate inspection of the car. It is submitted that the lengthy consideration of cases leading to the adoption of the test as being "a reasonable anticipation that intermediate inspection would be made" was unnecessary, and led to a conclusion which can not be supported in the light of the authorities from the House of

(15) (13) at p. 597 and (4) at p. 585.

Lords which we have considered in some detail. It was necessary to find only that the opportunity of intermediate inspection afforded by the plaintiff having been in possession of the car over night only was not "reasonable".

The greatest extension of the *M'Alister* doctrine seems to lie in the method in which it is applied, rather than in the actual doctrine. If the learned judges before whom similar cases are tried continue to relax the strict application of the "reasonable opportunity for intermediate inspection" (as was apparently the case in *Herschthal v. Stewart and Ardern* (6) and in *Barnett v. Packer & Co.* (10), and if the proof of no negligence is strictly enforced (as in the *Barnett* case) then there is a strong possibility that the manufacturer, repairer, etc., will be placed in a position analogous to that of an insurer. It will become almost essential for him to prove that the defect was not caused by his negligence in order to relieve himself of liability.

A. S. Williamson.

Note: Lord Atkin's formula which predicated a duty only in cases where there was no "reasonable possibility of intermediate inspection" arose out of his felt need for steering between the *Mulholland* and *Sadler* cases. Moreover, Lord Atkin was creating new law and was doing it with reasonable caution. The restricted formula permitted him to declare that a duty existed in the case before him. Why should a "reasonable possibility of intermediate inspection" negative a duty to manufacture carefully? (Does reasonable possibility mean 10 or 90 per cent. chance?) In the *M'Alister* case intermediate inspection was practically impossible. Surely that does not mean that the workmen may throw snails freely about the mixing room whenever the product is being bottled in bottles which are something less than opaque. If there is to be an intermediate inspection, the risk created by the manufacturer's carelessness is lessened because the danger may be discovered and reduced as a result of the inspection. A manufacturer is therefore, other things being equal, less negligent under such circumstances. But there remains the risk that the intermediate inspector may fail to discover or to obviate the danger. If the intermediate inspector negligently fails to remove the danger both he and the manufacturer should be liable to the injured party with rights to contribution *inter se* under the Tortfeasors Act. If as in Mr. Williamson's suppositious

case arising out of *Barnet v. Packer* the inspector himself is injured, he should recover. If he himself is contributory negligent his recovery should be reduced under the Contributory Negligence Act although the last chance doctrine would bar him at present. We cannot allow our intermediate inspector recovery without predicating a duty as to him, and we cannot say generally that the intermediate inspector is within the area of risk, but that consumers beyond him are not.

M. M. M.

SOME ASPECTS OF THE FACTORS ACTS

A leaves his car in the X Garage to be repaired. The X Garage which has a used car lot sells the car to B. B has no notice and gives valuable consideration. Does B get a good title?

Under the common law, B would have no claim to the car against A. A person could pass only such title as he himself had. But as England became a mercantile nation, the merchants demanded laws to permit greater facility in business transactions. One result of this agitation was the Factors Acts—the first of these passed in 1823 and the last in 1889. Prior to 1899 these Acts extended the power of factors or agents to give a good title to a *bont fide* purchaser for value. However, for the Act to apply the factor must be "an agent intrusted" with the possession of the goods, and intrusted meant intrusted for sale (1). In 1889 these acts were amended and consolidated into the Factors Act, 1889. This Act was copied *verbatim* by our Legislature, being Chapter 147 of the Revised Statutes. Section 3, subsection 1, of the Act reads:

> "Where a mercantile agent is with the consent of the owner, in possession of goods or of documents of title to goods, any sale, pledge or other disposition of the goods made by him in the ordinary course of business as a mercantile agent shall subject to the provisions of this Act be as valid as if he were expressly authorized by the owner of the goods to make the same."

It is obvious that the wording of the section has been changed. As it stood before 1889 the agent was "intrusted" with possession by the owner. Now the agent must be in possession "with the consent of the owner." What has been the effect of the change, particularly in regard to our theoretical problem? Has it increased or diminished the power of the factor to pass title or has the power remained the same?

In support of the view that it was enlarged is the case of *Moody v. Pall Mall Deposit and Forwarding Co. Ltd.* (2). In that case a French company sent to their London agents certain pictures, some for sale and others for exhibition only. All to remain the property of the French company until sold. The Company subsequently revoked the agents'

(1) Cole v. North Western Bank L.R. 10 C.P. 354 (1875).
(2) 33 T.L.R. 306 (1917).
(3) supra at 307.

authority and after the revocation the agents pledged the pictures. Mr. Justice Coleridge, in giving judgment, said (3):

> "But the words 'intrusted for sale' were replaced by the words 'in the possession of the agent' in the new Act. The object was to make the Act apply to such goods—all goods which were in the custody of the agent, whether for sale or not."

On the basis of that reasoning, the learned judge said that title passed even with respect to the pictures which were bailed for exhibition only.

In the case of *Whitney-Morton v. Short* (4), A, a truck company, sold a truck to M, on a conditioned sales agreement and immediately assigned the agreement to B (defendant). All documents were duly registered. M defaulted and the truck was re-possessed by B, who left it at A's garage "pending sale and seizure for repairs." A sold it to C and assigned this contract to D (plaintiff). C defaulted and the truck was returned to A's garage. B moved it to another place. D claims the truck. On the basis of the *Pall Mall* case, A was in possession with the owner's consent, and by the Factors Act could pass title. The case was not cited in the judgment. What the judgment would have been if it had is a matter of speculation, but it is a matter of fact that the learned Chief Justice of British Columbia said the law had not been changed by the changed wording of the Factors Act and used the reasoning of Mr. Justice Channel in *Appenheimer v. Attenborough* (5) in coming to that conclusion.

Another difficulty is involved in this problem. What does consent mean? The two leading cases though distinguishable express conflicting views.

The first case, *Folkes v. King* (6), A the owner of a car delivered it to B, a salesman, to sell at a price not less than a stipulated amount without A's permission. B intended from the start to sell the car immediately at the best price he could and to use proceeds himself. He sold the car to C for less than the amount agreed. C bought in good faith and without notice. The Court said B had the car with the owner's consent and therefore title passed. Lord Justice Scrutton referring to the requirements involved in larceny by trick, said that assuming the offence

(4) (1922) 67 D.L.R. 573.
(5) (1907) 1 K.B. at 514. See also Benjamin on Sales (6 ed.) 43.
(6) 1923 1 K.B. 282.

to be established (in his opinion it was not) the purchaser's title would still be valid. He based this conclusion on his opinion that the legislature never intended to incorporate into the Factors Act the technicalities surrounding consent in the criminal law.

In that same year, the *Heaps* (7) case was decided with a different result. There A came to B, the owner of a car, and said that he could probably sell it to a friend C. B gave the car over. B was not a car salesman and there was no C. A sold the car to D and kept the money. The court decided the case on two grounds. In the first place A was not a mercantile agent. This is the fact which makes it distinguishable from *Folkes v. King*. But on the other point the court said that there was larceny by trick and that that precluded consent.

To return to the hypothetical case with which this discussion opened; we find that two difficulties are involved:

(1) What is the effect of the legislative deletion of "intrusted" and its substitution of "in possession with the consent of"? No clear answer can be given. Apart from the *Pall Mall* case the indications are that this change will have no effect on the law.

(2) Is "in possession with the consent of" broad enough to embrace a situation in which the possessor would be guilty of larceny by trick at common law? Again we do not know. Eminent judges have expressed different views.

These uncertainties make our conclusion barren, but perhaps this practical demonstration of the ambiguities inherent in familiar legal concepts may show the need for extraordinary care in legislative drafting.

J. G. MacDonell.

(7) Heaps v. Motorist Advisory Agency 1923 1 K.B. 577.

SIR JONATHAN FREDERICK POLLOCK (1783-1870)

Sir Jonathan Frederick Pollock was born in the Parish of St. Martin's-in-the-Fields in 1783, the third son of David Pollock, a humble saddler to His Majesty George III. He was a member of a family which, starting from humble beginnings, rose to great prominence in England. It is interesting to note the broad nose, the wide forehead, the large, common-sense ears and the strong chin, which have come to characterize "the Pollock face". Sir Frederick inherited these from his mother, whose stern discipline in the home must have had a very great influence in shaping the careers of her outstanding family. The eldest son, Sir David Pollock, after some years in the practice of law in England, received the appointment of Chief Justice of the Supreme Court of Bombay. The youngest son, Sir George Pollock, distinguished himself in the army in India, and won particular prominence in the Afghanistan campaign, rising finally to the rank of Field Marshal.

During his student days Sir Jonathan Frederick Pollock had considerable financial difficulty. Had he not been able to borrow from his tutor he would not have received his B.A. In spite of this, or perhaps as a result, he distinguished himself at University, and was called to the Bar at the Middle Temple in 1809.

In his work as a barrister, Sir Frederick combined great natural gifts with a very profound knowledge of the theory and practice of the common law, and rapidly acquired a very extensive practice, both in Westminster and in the northern circuit, rivalling Brougham and Scarlett. He won considerable prestige for his conduct of the case of *Wright v. Tatham* (1). In 1827 he took silk, and in 1831 he was elected member for Huntingdon. He served twice under Peel as Attorney General, and was knighted in 1834 when he first took that position.

It is told of Sir Frederick that when he found from Garter King-at-Arms the cost of preparing the coat of arms necessary to this position, he sent the following message: "Tell Garter King-at-Arms with my compliments that he may go to the devil sable in flames gules with a pitchfork ardent stuck in his backside proper". He then obtained his coat of arms from Lyon King-at-Arms in Scotland.

In 1844 he replaced Abinger as Chief Baron of the Exchequer, and sat until 1866, when he retired. His decisions in this position, although never

(1) 1 Ad. & Ell. 3 (1834) Ex. Ch.; 5 Cl. & F. 670 (1838) H.L.

spectacularly brilliant, were usually legally sound, and were always interesting. One of his most outstanding opinions was in *Egerton v. Lord Brownlow* (2). That was a case of devise to trustees to convey to the use of Lord A, remainder to his heirs male on condition that Lord A be made either Duke or Earl of B. before he died. On the appeal to the House of Lords, the judges were summoned and Sir Frederick and Baron Platt disagreed with the Vice-Chancellor, Lord Cranworth, Baron Parke, Baron Alderson, Mr. Justice Erle, Mr. Justice Cresswell and all the other judges, and contended that the condition was subsequent to the vesting, and that to enforce it would be contrary to public policy, in that it would encourage the use of corrupt means to obtain titles. They were upheld in both contentions by the judgment of the House of Lords.

On his retirement in 1866, Sir Frederick received a baronetcy, and in 1870 he died, bringing to an end a distinguished life of 87 years. He was survived by six sons and five daughters of his first marriage and two sons and five daughters of his second marriage, and was succeeded in title by his eldest son, Sir William Frederick Pollock. This son, although he did not distinguish himself so highly in law, was very prominent in literary circles, translating Dante's "Divine Comedy" into English. Sir Jonathan Frederick Pollock's fourth son was Sir Charles Edward Pollock, who, after a long period of apprenticeship and study, became the highest-ranking justice in England after the passing of the Judicature Acts, and contributed much to the legal literature of that and the present time.

A grandson, Sir Ernest Pollock, became Lord Cranworth, and was appointed Master of the Rolls. Another grandson, the son of Sir William Frederick Pollock, and the greatest of them all, was Sir Frederick Pollock (1845-1937), who edited the Law Reports and the Law Quarterly Review, was Corpus Professor of Jurisprudence at Oxford, and wrote many valuable legal textbooks on various subjects.

Of Sir Jonathan Frederick Pollock it may be said that although he was not among the greatest of legal men, his advancement in the face of humble birth and poor finances, and his dependability in his judicial capacity, amply qualify him to be considered one of the outstanding common law judges, those pillars on which rest the common law tradition so much a part of our present legal system.

D. M. McCormick.

(2) (1853) 4 H.L. Cas. 1; 10 E.R. 359, H.L.

Sir Frederick Jonathan Pollock (1783-1870)

CORRESPONDENCE

November 17, 1941.

The Editor,
Alberta Law Quarterly,
University of Alberta,
Edmonton, Alberta.

DEAR SIR:

In Volume IV, No. 2, of your publication there is an article dealing with appeals in summary trial and summary conviction cases written by me. His Honour Judge J. W. McDonald, of Calgary, has pointed out that the following statement contained on page 43 of the said article would seem to be too broad:

> "Part XV of the Code deals only with matters which are under Dominion jurisdiction. Any Provincial offence can be dealt with only if the Provincial statute gives an appeal to the District Court."

Part XV of the Code, in Section 706 (a), specifically restricts the application of the Part to any offence or act over which the Parliament of Canada has legislative authority. Consequently Part XV of the Criminal Code does not apply, apart from other legislation, to offences and appeals from offences against Provincial statutes. In Alberta The Summary Convictions Act, being Chapter 9 of the Statutes of Alberta, 1935, as amended by Chapter 29 of the Statutes of Alberta, 1937, takes over the machinery provided by Part XV of the Criminal Code in all cases dealing with summary conviction matters "and proceedings relating thereto".

Most, if not all, of the Alberta Provincial statutes which provide penalties, specifically state that they shall be dealt with by way of summary conviction and as a consequence Part XV would apply. In the case of *Prudius vs. Johnson,* reported in 1924, Vol. 2, of the Western Weekly Reports at page 105, the late Mr. Justice Beck held that the words "and proceedings relating thereto," as used in the section of the statute with which he was dealing and which was similar to The Summary Convictions Act referred to above, meant that all of Part XV applied including the procedure relating to appeals.

Yours truly,

A. T. MCLEAN.

TRANSFER OF SOVEREIGNTY AND NON-RECOGNITION AS AFFECTING NATIONALITY

1.—Introductory

The purpose of this study is to consider firstly, the effect of a transfer of sovereignty upon persons connected with the territory concerned by reason of their nationality, domicile or residence; and secondly to consider the position of such persons vis-a-vis a state which has invoked the doctrine of "non-recognition" with respect to that transfer of sovereignty. It should be clearly borne in mind that the sort of transfer of sovereignty under consideration is not simply a question of succession as between two forms of government representing the same State. Rather, it is a question of succession, by cession, conquest or annexation, between States, or as between one State and part of another.

2.—Effect of Transfer of Sovereignty Upon Nationality

(a) *Comment in Treatises*

When a State acquires new territory by gift, cession, conquest, or by whatever means, the political status of the inhabitants of the territory must be determined. While international law provides no well defined and clear cut rule, it is general stated by writers on international law (1) that the inhabitants of ceded territory automatically lose their old political allegiance and acquire that of the annexing State (2). Ordinarily the reservation is made that the original nationality may be preserved by means of option. Principles affecting the nationality of persons in transferred territory have changed considerably in the last fifty years. It may be well, before attempting any definition of the present law, apart from treaty provisions, to examine in detail some of the statements of leading writers on international law and some of the court decisions.

John Bassett Moore, the father of international law for United States scholars, declares:

(1) Fauchille, Droit International Public (1922), Vol. 1, Sec. 427, at 856; Hall, International Law, at 685, 686; Westlatse, Private International Law, 6th ed., at 364.

(2) But see Treaty of Paris, Dec. 10, 1898, ceding Porto Rico and the Philippines to the United States, which provided inter alia that "the civil and political status of the native inhabitants of the territories ceded to the United States shall be determined by Congress."

"On a transfer of territory by one nation to another, the political relations between the inhabitants of the ceded country and the former Government are changed, and new ones arise between them and the new Government. The manner in which this is to be effected is ordinarily the subject of treaty. The contracting parties have the right to contract to transfer and receive, respectively, the allegiance of all the native-born citizens; but the naturalized citizens, who owe allegiance purely statutory, are, when released therefrom remitted to their original status" (3).

Sir Francis Piggott, in his work on Nationality (4) concludes that, in the case of severance of a portion of territory from a State, the future nationality of all persons affected depends on their own free will; but that, in the absence of any act from which their intention to belong to the new state may be inferred, their original nationality will be held to have continued. The *prima facies* is on the side of the old nationality and not the new.

Hall states:

"The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into international law, and cannot be adopted into it until title by conquest" (5).

(b) *Decisions of Courts and Tribunals*

1.—*English decisions*

One of the best known English cases in point is *Doe d. Thomas v. Acklam* (6). The facts in this case were as follows:

James Ludlow was born in a part of North America which was at the time a British Colony; he was therefore a British subject. His daughter was born after the recognition of the independence of the Colonies. The question was whether at the time of her birth her father was still a natural-born British subject. It was answered in the negative because after the Colonies had become part of the United States and their inhabitants generally citizens of the United States, James Ludlow "by his continued residence in those States manifestly became a citizen of them."

(3) Moore's Digest, Vol. III, at 312.
(4) Nationality, Part I, at 88.
(5) Hall, International Law, 4th ed., at 49.
(6) 2 B. & C. 799 Ruling Cases, Vol. II, at 632.

Abbot, C.J., stated the effect of severance thus: "A relinquishment of the government of a territory is a relinquishment of authority over the inhabitants of that territory."

Another leading case arising out of the War of Independence was *In re Bruce* (7). A person born in Maryland in 1764, and therefore a British subject, married in the United States after the Treaty of Peace with England. The Court held "that the King having relinquished his claim to the allegiance of the American citizens, this particular American acquiesced in the relinquishment."

The third English case to be noted is *Jephson v. Riera* (8). The Plaintiff was a native of Minorca, born in 1782, and the daughter of Peter Walls, also a native of the Island, which at the time of his birth belonged to Great Britain. In 1783 the Island was ceded to Spain. It was contended that after the cession Walls and his family adhered to the Spanish Government and abandoned their allegiance to Great Britain. On the other hand it was proved that soon after the cession, and before the expiry of the time allowed by the treaty for the removal of their property, Walls left Minorca for England with the intention of never returning thither to make it his place of domicile, and that from that time he never did return, but settled in Gibraltar. There was an attempt, apparently unsuccessful to prove that he did in fact return to Minorca with the intention of obtaining employment there. The Judicial Committee of the Privy Council held that, even if the fact had been proved, it would not, in the presence of the previous facts, have warranted a finding that he had so returned under circumstances which would have established his intention to abandon the privileges of a British subject, which he had preserved to himself by his action within the period of protection provided by the treaty.

In each of these three leading English cases the decision clearly turns on some definite circumstance which occurred at the time of the severance. In the Ludlow case there was "continued residence"; Bruce "remarried in the United States"; Walls exercised the treaty privilege of leaving Minorca.

What, then, is to determine nationality when a transfer of territory takes place? Is change of nationality to be imposed on all nationals of the

(7) 2 Cr. and J. 436.
(8) 3 Knapp P.C. 130; but cf. Doe d. Auchmyty v. Mulcastle, 5 B. & C. 771.

transferred territory; or is express proof of definite intention to assume the new allegiance necessary in each case? How far is any over act necessary to indicate this intention? Before attempting to answer these questions let us examine some of the decisions of foreign courts.

2.—*United States decisions*

Three leading United States cases shed some light on the attitude of the United States Courts to the question under consideration. In *Boyd v. Thayer* (9), Chief Justice Fuller stated bluntly: "The nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided."

The Tribunal held, in the case of *Masson v. Mexico* (10), that change of sovereignty over territory affects only nationals of the predecessor state. The nationality of other persons residing in the territory at the time of transfer is not affected.

In *Crane v. Reeder* (11), it was held that, under Article 2 of the Treaty of 1794 between the United States and Great Britain, British subjects residing in Detroit at the time of the British evacuation of the territory of Michigan and continuing to reside there without declaring their intention within one year to remain British subjects acquired American nationality.

3.—*Foreign decisions*

One of the more recent foreign decisions is that in the case of *Julianna M. v. Jossef Sch* (12), handed down by Supreme Court of Hungary on the 14th day of December, 1927.

In this case the plaintiff had been separated from her husband, the defendant, for the last thirty-four years. She was employed, with his consent, in a kindergarten school managed by the State in Nagyszalonta (Hungary). After the Armistice, Nagyszlonta was occupied by Roumanian troops and subsequently ceded in the Treaty of Trianon to Roumania. The Treaty entered into force on the 26th of July, 1921. On

(9) (1892) 143 U.S. 135.
(10) 3 Moore, International Arbitration, 2542-2543.
(11) (1872) 25 Mich. 303.
(12) Lanterpacht, Annual Digest of International Law Cases, 1924-1925 inclusive.

the 15th of June of that year the plaintiff settled in Szeged, which remained part of Hungarian territory. She assumed permanent residence there and was in receipt of a pension from the Hungarian State. Her husband, who was resident in a commune ceded to Roumania acquired Roumanian nationality as a result of the Treaty of Trianon. In 1925 the plaintiff instituted divorce proceedings against the defendant in a Hungarian court. The defendant contended that the plaintiff was not an Hungarian national and that Hungarian courts had, therefore, no jurisdiction. It was held that the plaintiff was an Hungarian national and that Hungarian courts had jurisdiction. The change in a husband's nationality as a result of session affected the nationality of his wife only if she was living with him; it had no effect upon a wife who has been separated from her husband for a long time.

Another interesting decision is that in the *Oodenburg* (13) case before the Austrian Administrative Court on the 2nd of September, 1927. Without attempting here to review the facts, the Court's opinion was that the change of territorial sovereignty brings about the change of nationality in ceded territory. It was stated that that change is brought about not as the result of a treaty of cession alone, but only as the result of the treaty of cession in conjunction with the actual taking possession of the territory. The court went on to explain that this is the reason why the periods of option laid down in the Treaties of Versailles and St. Germain begin only with the moment of the definite transfer of sovereignty.

The Court concluded that if, as the result of cession, a State loses its citizens at a time other than at the time of the actual transference of sovereignty it would lead to impossible results. Thus for example, it would have to treat them for a time as aliens, and it could actually deport them before the transfer of territory has taken place.

Still another decision in point is that in the *Presumptive Nationality (Yugoslavia) Case* (14), handed down by the Supreme Court of Hungary on the 20th of January, 1928. In this case the plaintiff and his family had taken up residence in Yugoslavian territory, as from the 18th of August, 1918, in a district which before the Treaty of Trianon belonged to Hungary. The plaintiff objected to being treated as an alien and consequently to being required to deposit costs in proceedings before an

(13) Lanterpacht, cited supra note 12.
(14) Lanterpacht, cited supra note 12.

Hungarian Court. It was held that costs must be deposited. The fact that plaintiff and his family had since the 18th August, 1918, been resident in Yugoslavia, and since that date had not returned to Hungarian territory with the intention of assuming permanent residence, justified the court in presuming that the plaintiff was a Yugoslav national. This presumption might be rebutted by the introduction of appropriate evidence.

Three noteworthy decisions on the effect of transfer of sovereignty upon nationality have been handed down in Egypt. The first of these was in the case of *Romano v. Comma* (15) before the Egyptian Mixed Court of Appeal, on the 12th of May, 1925. The facts are unimportant. The Court held that where there is a diplomatic conflict as to the nationality of a person, which cannot be settled by the executive authorities, the Mixed Courts (of Egypt) are competent to determine the question of nationality, and are not bound by a decision given by a foreign Court.

It was also held that when a State is annexed and disappears completely, all the nationals of the annexed state become automatically subjects of the annexing state without necessity for an express declaration on their part. No option for nationality is possible when the former State disappears entirely.

In the case of *Pini v. Pini* (16), before the Egyptian Mixed Court of Appeal on the 18th of April, 1925, it was held when a state is completely annexed, its subjects, wherever born or wherever they may be domiciled, become subjects of the annexing state.

But the Court added that the annexation of a territory cannot in any case modify the national status of the subjects of a foreign power resident in the territory.

The Egyptian Civil Tribunal of Cairo, in the case of *Golovitschimer v. Dori* (17) on the 24th of December, 1923, held that Russia, not having been conquered or annexed by a foreign State, had kept her existence as a distinct State, and the Russians had preserved their Russian nationality, even though the new Soviet Government of Russia had not been recognized.

A case which is of some immediate significance is that of *Wildermann v. Stinnes* (18), before the Roumanian-German Mixed Arbitral Tribunal,

(15) Ibid.
(16) Ibid.
(17) Ibid.
(18) Ibid.

on the 6th of November, 1924. It had to do with the effect of change in territorial sovereignty upon the nationality of persons born in the transferred territory but who at the time of transfer were residing abroad. Bessarabia was annexed by Roumania in 1918, and the annexation was recognized by the United Kingdom, France, Italy and Japan in 1920. The plaintiff had been born of Russian parents in Bessarabia when that province was Russian.

It was held that two alternatives were open to the Court as to nationality of Bessarabians wherever resident. The one was to assume that so long as Russia had not by treaty agreed to the separation of Bessarabia from Russia, the Bessarabians must in international law be regarded as Russian subjects. The other was to assume that, as a result of the secession followed by union, Bessarabians have become Roumanian subjects. The Tribunal adopted the second alternative on the ground that the secession and union took place "at the time of the dismemberment of the Russian Empire, and when the map of Europe was changing in accordance with the principle of self-determination"!

A contrary decision was reached in the case of *Peinitsch v. German State and others* (19), before the German-Yugoslav Mixed Arbitral Tribunal, on the 18th of September, 1922, where it was held to be a rule of international law that when a territory passes to a new sovereign, it must, in case of doubt, be assumed that those inhabitants of the territory in question who are not domiciled there do not acquire the new nationality.

However this case it would seem, is distinguishable from the Stinnes case on the ground that the former had to do with the transfer of only a piece of territory whereas the latter resulted in the creation of an entirely new State.

Finally, the case of the *Republic of Poland v. Karas* (20), before the Supreme Court of Poland, on the 14th of August, 1923, should be noted. The defendant in the case was a native of a town which was in an area that subsequently became part of Poland. He was taken prisoner by the Russians while serving in the Austrian army. After the peace settlement he returned to his native village in what was now Poland. Prior to this time he had been an official of the new Soviet Government.

(19) Ibid.
(20) Ibid.

He was charged as a Polish citizen with an offense against the State. The defendant claimed that, because of his absence from his native village at the time that it came within the sovereignty of Poland, he could not be deemed to be Polish. It was held that he had actually acquired Polish nationality merely because of the fact that he was a native of a town now in Poland.

What conclusions, if any, may be drawn from the decisions discussed above? First, it will be noted that there is a marked similarity between the English and the United States decisions, in that the cases in both countries seem to turn upon some action of the *individual* concerned *at the time of transfer*. The right of the individual inhabitant of transferred territory to withdraw therefrom and retain his original nationality, or to remain and acquire a new nationality, seems to be clearly preserved. Unfortunately, no English or United States decision has been found where the transfer results in the complete absorption of one State by another.

The principles laid down in the several foreign cases discussed are less clear. Generally speaking, they seem to be more or less agreed on the following, viz.: that a transfer of territory affects only nationals of the ceded territory; that the change of nationality is effected not by treaty alone, but by the provisions of the treaty accompanied by an actual taking of posession by the successor State; that the nationality of foreigners in transferred territory is not affected by the transfer; that when a new State is carved out of the territory of one or more older States, a person born in the territory of the new State will *ipso facto* become a national of that new State, unless he has been naturalized elsewhere prior to the creation of the new State; that inhabitants of a State which, as a result of cession or annexation, disappears entirely, may not opt, but automatically become nationals of the successor State; that a separated wife who remains in ceded territory when her husband moves to the remaining part of the dismembered State, will acquire new nationality, and will not retain that of her husband; that in all other cases, the option exercised by the husband will affect his wife also.

These conclusions fall far short of providing a complete guide to the principles affecting nationality of inhabitants of transferred territory. They will at least form a background for the consideration which follows of treaties touching upon this delicate problem.

(c) *Treaties*

1.—*General Provisions*

An examination of treaties of cession during the 19th century reveals that the criteria usually followed in determining the nationality of the inhabitants of transferred territory were those of domicile and birth. When domicile alone was followed the persons affected included the native-born and the naturalized citizens, as well as the aliens domiciled in the ceded territory. When birth was the determining factor, it included those individuals who were born in the transferred territory regardless of domicile at the time the transfer was made. Both principles were at times combined in the following manner: the first, and more restrictive, namely, domicile, has been made to include only those individuals who were in the ceded territory and actually domiciled there at the time of the cession, the second and more inclusive, namely birth, has been made to embrace those who were born in the territory regardless of domicile as well as those individuals who were domiciled there at the time of the territorial transfer.

The peace settlement after the World War brought a departure from the general practice of denationalizing *en masse* the inhabitants of a territory in which a change of sovereignty had occurred. As a result, nationality was automatically acquired only in certain cases. The Treaty of Versailles, while in most cases adhering to the domicile rule for determining changes of nationality, followed an entirely new principle for automatically conferring French nationality upon the inhabitants of the ceded territory of Alsace-Lorraine. French nationality was acquired automatically only by those persons who had lost their French nationality by the application of the Treaty of Frankfort of May 10, 1871, and who had not since that date acquired a nationality other than German. The descendants of these persons, with certain exceptions, were also included (21).

The other inhabitants of the ceded territories might acquire French nationality either upon reclamation or by naturalization (22).

A further development regarding the determination of nationality which the peace settlement of 1918-1919 brought about was that of "indigénat." The treaties of St. Germain and of Trianon both followed this principle, the reason being that in those countries affected by the treaties besides

(21) Treaty of Versailles, Article 79, Annex, para. 1.
(22) Ibid, para. 2 and para. 3.

being a national of the State, the individual belonged to a certain commune having its own municipal citizenship. Both Austria (23) and Hungary (24) recognized that any person having indigénat on the territory formerly a part of the Austro-Hungarian Empire would lose his old nationality and acquire that of the state to which the territory was transferred.

2.—*Option*

Individuals whose nationality is affected by transfers of territory are usually permitted to conserve their original nationality by means of option. Writers are by no means unanimously agreed as to the existence of option as a rule of international law. However, most treaties of cession since the beginning of the 19th century have specifically provided for option. The peace treaties of 1914-1918, with one single exception (26), consistently followed this practice. The terms under which option might be exercised have varied with the different treaties. In some cases the option might be effected simply by emigration from the territories concerned (27). In others, a formal declaration of election has been the sole requirement (28). Others again have stipulated both for a declaration and emigration (29). A time limit is always set for the fulfillment of the requirements. The usual provision was to make the period extend from the date of exchange of ratifications, but in a few instances it has been made to run from the signature of the Treaty (30).

As stated above, the peace treaties of 1919-1920 gave the general recognition to the right of option. The Treaty of Versailles allowed German nationals over eighteen years of age who were ordinarily resident in territories assigned to Belgium, Czecho-Slovakia, Poland, Danzig and Denmark two years within which to opt for German nationality, but required them to transfer their residence to Germany within twelve months after the declaration of option was made (31). Similar provisions occur

(23) Treaty of St. Germain, Art. 70.
(24) Treaty of Trianon, Art. 61.
(26) Alsace-Lorraine, Treaty of Versailles, Article 79.
(27) Treaty between Great Britain and Germany, July 1, 1890.
(28) Treaty of Constantinople, March 14, 1914.
(29) Treaty of Portsmouth, Sept. 5, 1905.
(30) Treaty of Constantinople, March 14, 1914.
(31) Articles 37, 85, 91, 106, 113.

in the treaties of Neuilly (32), Sevres (33), St. Germain (34) and Trianon (35).

3.—*Juridical effects of Option*

Married Women

With respect to married women, in the absence of treaty provisions, the general practise, based on the principle that the nationality of the wife is that of the husband, has opposed the right of married women to opt (36). The peace treaties of 1919-1920 all specifically provide that the option of the husband should include that of the wife (37).

Minor Children

Treaty provisions with respect to minor children are less common. Some instances occur where it is provided that the period of option for minors should run from the date of the attainment of their majority (38); in others, the option of parents or guardians has included the children (39). Again, it has been provided that the option of parents alone may determine the status of minor children. All of the treaties following the peace settlement of the Great War provided that children under eighteen years of age were included in the option of their parents (40). No provision was made for children whose parents might not be living.

Certain of the treaties of 1919-1920 recognized the principles of the *jus soli* for the determination of nationality. The *jus soli* was adopted as the determining principle in the treaties between the Allied and Associated Powers and Poland, Czecho-Slovakia, Roumania, Bulgaria and Yugoslavia (41). Each of these states agreed to recognize as their nationals *jus soli* all persons born in their territory who were not born nationals of another state.

(32) Articles 40, 45.
(33) Article 124.
(34) Article 78.
(35) Article 63.
(36) Phillipson: Termination of War and Treaties of Peace (1916), at 35 & 36.
(37) Treaty of Versailles, Articles 37, 85, 91, 106, 113.
Treaty of Neuilly, Article 45.
Treaty of Sevres, Article 130.
Treaty of St. Germain, Article 78.
Treaty of Trianon, Article 63.
(38) Treaty of Constantinople, March 14, 1914.
(39) Anglo-French Convention, April 8, 1904.
(40) See note xx, p. 26, supra.
(41) See Article 6 of the treaties named.

To sum up, an examination of treaties entered into prior to the World War reveals that it was usual to insert a clause security liberty of inhabitants of ceded territory to keep their nationality of origin. In the case of persons native of and established in, the ceded territory, this liberty was commonly saddled with the condition that they should retire within the territory remaining to their state of origin, a certain time being allowed to them to arrange their affairs and dispose of landed and other property which they may be unable to take with them.

These principles, with some variations, are seen to obtain in the post-war treaties of Versailles, St. Germain, Trianon and Neuilly. Persons usually resident or possessing rights of citizenship in territory which formed part of the state making the cession obtained the nationality of the state exercising sovereignty over the territory. A right of option to retain their nationality was given to persons above the age of 18 years, though the terms of the right varied in each case.

Withdrawal from a ceded district is not conclusive evidence of the intention of the person withdrawing to reject the nationality of the conquering state. It is therefore usual to exact an express declaration of intention as a condition of preservation of the nationality of birth from persons against whom there is a presumption of changed nationality.

(d) *General Observations*

The Harvard Research Draft Convention on Nationality provides in Article 18, as follows:

> When the entire territory of a state is acquired by another state those persons who were nationals of the first state become nationals of the successor state, unless in accordance with the provisions of the law they decline the nationality of the successor state.
>
> When part of the territory of a state is acquired by another state or becomes the territory of a new state, the nationals of the first state who continue their habitual residence in such territory lose the nationality of that state and become nationals of the successor state, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor state they decline the nationality thereof (42).

In the first paragraph, it will be noted, the place of residence at the time of the transfer is not considered. The nationality of the successor

(42) Research in International Law, Harvard Law School, April 1, 1929.

State is acquired regardless of residence, to avoid statelessness. Nationals of the State annexed become nationals of the annexing State unless (a) the latter provides by law that they may decline its nationality and (b) that advantage is taken of this provision. The article does not require the annexing state to make any such provision.

In the second paragraph, residence is a necessary element to be considered and nationals of the transferred territory do not acquire the nationality of the annexing state unless they continue their usual residence in the transferred territory. It is implied in this provision that former residents of the territory annexed or otherwise transferred, who had abandoned their residence therein at the time of the transfer, are not affected as to their nationality by the transfer.

The draftsmen, in commenting upon the above Article in the Draft Convention, say:

> This article is believed to express a rule of international law which is generally recognized, although there might be differences of opinion with regard to its application under particular conditions. The cases of collective naturalization, such as those provided for in this article, are the only cases in which international law, without an applicable provision in the municipal law of a state, declares that a person has the nationality of the state. It might be said that international law assumes that the successor state confers its nationality upon the naionals of the predecessor state residing in the annexed territory at the time of the annexation (43).

The foregoing commentary upon the Article of the Harvard Research Draft Convention might well serve as a commentary upon the whole problem discussed under this section. From a number of chaotic and obscure legal sources, text writers, cases and treaties, it has been possible to draw the few general principles above stated. With the single exception of the statement in Moore's Digest, above referred to, nothing has been said of the delicate problem of the naturalized inhabitant of a State subsequently completely absorbed by another State. Upon the question of whether such a person acquires the nationality of the annexing State, or becomes stateless, or reverts to his nationality of origin, no material has been found. The problem has been carefully avoided by writers on

(43 | Ibid, at 61.

international law. This is but one of many kindred problems which it is not possible to examine within the space of this study. It is intended merely to illustrate the fact that the problems herein discussed by no means exhaust the possible difficulties that must confront the scholar or practitioner in this highly technical field of law.

3.—Effect of Non-Recognition

(a) *The Doctrine of Non-Recognition*

The Governments of Lithuania, Latvia and Esthonia have recently ceased to exist as independent sovereign states, and have become merged in the greater sovereignty of a single state, viz.: the Soviet Union. The Roumanian province of Bessarabia has ceased to be a portion of the sovereign state of Roumania and has become part of the Soviet Union. A portion of another Roumanian province, Transylvania, has come under the sovereignty of Hungary.

None of these transfers of sovereignty has taken place without an element of duress. While the external trappings of consent have been given to the transfer in each case, in point of fact the transfers may be said to have been the result of the threat of the use of force. The preliminary question then is whether in international law a good title to territory, an effective transfer of sovereignty, is acquired by actual occupation, based on the threat of the use of force.

Writers on international law share the opinion that a valid transfer of sovereignty over a particular territory may take place either by conquest and annexation or by cession. It is only in more recent years that transfers of territorial sovereignty through the threatened, but not actual, use of force has become a common practice.

Certain provisions of the covenant of the League of Nations and the Kellogg-Briand Pact were aimed at causing embarrassment to aggressor states who, by threatened or actual use of force, attempted to effect a transfer of sovereignty. This averting of the eyes from an unpleasant but none the less real state of facts is known as the doctrine of "Non-Recognition." The classic example is the attitude of the United States Government vis-a-vis Manchukuo, detached from the territory of China by Japan. Some light upon the consequences of "Non-Recognition" of the acquisition by one state of the territory of another by means which would be regarded as contrary to the Covenant and the Kellogg Pact is shed by

the desire of an annexing state to secure in advance the acquiescence or the indifference of states which might be expected to raise objection.

The benefits which accrue to a State annexing territory from the active recognition or passive indifference of other States are plain. The expression of approval or the absence of protest tends to confirm her title. Her newly acquired subjects will usually become entitled to the treaty privileges which her existing subjects enjoy. The manufacturing and shipping interests of the newly acquired territory will usually receive the same treatment from foreign states as those of the annexing state and generally the newly acquired territory and its inhabitants will enter into the enjoyment of the same international benefits as are enjoyed by the territory and the inhabitants of the annexing state.

Professor Arnold McNair, in an article entitled "The Stimson Doctrine of Non-Recognition" (44), examines the disadvantages which will result to the annexing state and its newly acquired territory from non-recognition.

(1) *Commercial Treaties*

Suppose that a non-recognizing state declines to regard commercial treaties with the annexing state as applicable to the newly annexed territory. The inhabitants of that territory will be denied the benefits of those treaties and their commerce will to that extent be restricted. *Per contra,* the commerce of the non-recognizing state will be similarly restricted. Theoretically it is perhaps conceivable that commerce might continue on the basis of any former commercial treaties applicable to the annexed territory, but that is unlikely when the territory is no longer under the control of the government which made the treaties.

(2) *Extradition Treaties*

Similarly a refusal by a non-recognizing state to regard extradition treaties with the annexing state as applicable to the newly annexed territory merely means that the non-recognizing state will not extradite to the annexing state fugitive criminals alleged to have committed crimes on the newly annexed territory, and will not demand from the annexing state alleged criminals who have found refuge on that territory. The only persons likely to benefit are the alleged criminals.

(44) British Year Book of International Law, 1933, at 65.

(3) *Diplomatic Protection*

It is the view of some authorities that "the act of soliciting and receiving from the government of a certain country an exequatur for a consular officer at a particular place is not a conclusive recognition of such country's sovereignty over the place in question " (45). Certainly consuls have frequently remained at their posts and exercised some of their functions during revolutions and changes of *de facto* sovereignty without involving their governments in recognition of the new government or state claiming to exercise authority over the territory involved. In this was a very limited amount of protection for the nationals of a non-recognizing state might be possible, but such a situation could only be temporary, and in cases of serious injury to the persons or the property of those nationals it seems inevitable that the non-recognizing state would be driven to make application to the government in fact exercising authority in the territory in question. For instance, if today a British subject were kidnapped by bandits—I mean real bandits—near Mukden, it would not help him much if the British Government made representations to the Chinese Government and requested from them energetic action to procure his release.

(4) *Protection of Industrial, Literary, and Artistic Property*

A certain amount of loss and inconvenience might fall upon the inhabitants of the territory in question if the new state claiming to exist upon that territory were refused admission to the International Unions which have been established for the protection of property of these kinds, or if the state claiming to have incorporated the territory were denied the benefits of these Unions in relation to that territory. But the fact that already certain states exist which have not found it necessary to join these Unions suggests that membership of them is not an essential.

(5) *Generally*

It would seem that, when a state annexing territory is met with a protest or declaration of non-recognition by other states, it cannot claim from those states in respect of that territory the benefits of any guarantee such as Article 10 of the Covenant (a security standing very much below par at the moment) or the application of the less definite implications of the Kellogg Pact.

McNair concluded that the doctrine of "non-recognition" gets one nowhere.

(b) *Non-Recognition and Status of Inhabitants of Transferred Territory*

It is desired to avoid any prolonged discussion of the distinction between *de jure* and *de facto* recognition. The doctrine of "non-recognition", it is submitted must be taken to mean "non-recognition" *de jure*. "Non-recognition" *de facto* would by implication require that the fact of a transfer of territory be denied. "Non-recognition" *de jure,* while admitting the fact of transfer, would bar giving effect to the legal consequence of such a factual situation. What, then, would be the results consequent upon the adoption of this restrictive definition of the doctrine of "non-recognition"?

Take a practical illustration. Mr. X, a national of Latvia, is at the time of the State's incorporation into the Soviet Union residing in Canada. Mr. X, on September 1st, 1940, marries a Canadian national.

If at the time of the marriage, the Latvian national has acquired Russian nationality, then, under Russian law, his wife does not acquire the nationality of her husband. The Canadian woman would therefore remain a British subject. But, if the Canadian Government may refuse to recognize that Latvia has become a part of Russia, it would be more difficult to deny that Latvia, as a separate political entity, had ceased to exist. The Latvian national, Mr. X, could then be regarded as stateless, and his Canadian born wife would not have lost her British nationality by virtue of her marriage on the 1st of September, 1940. Such a treatment of the case would involve an implied admission that something had happened to alter the international status of Latvia, while at the same time denying to the Soviet Union the fruits that would be hers if the absorption of Latvia by that country were recognized *de jure* or *de facto*. In short, *de jure,* the doctrine of "non-recognition" would be in force, while *de facto,* recognition would apply only in respect of one fact, namely, that Latvia had ceased to exist. Such a course, it is submitted, is far more equitable and works less actual hardship than to apply the doctrine of "non-recognition" both *de facto* and *de jure,* and to continue to regard Mr. X as a Latvian national when his country no longer exists.

But what may ameliorate circumstances for the Canadian wife of Mr. X, may well create very real hardships for Mr. X himself. To be stateless would be far more embarrassing than to be regarded as the national of a country which continued to exist in theory but not in fact. The

logical approach must be from the municipal law, rather than the international law point of view. If the situation is dealt with in this way the hypothetical case of Mr. X, simplifies itself. We may continue to regard him as a Latvian national. An Order-in-Council may be passed providing that Canadian women marrying Latvians as from a certain date shall not lose their British nationality by so doing. Kindred problems may be dealt with in the same manner. It is very much simpler than attempting to solve the problem by invoking the ever changing principles of international law.

(c) *Conclusion*

In this study an attempt has been made to set forth the principles which affect the nationality of inhabitants of territory over which the sovereignty has been changed. To lay down any clear cut and well defined rules has not been easy. But difficult as the task may have been, it is as nothing compared with the intricacies of the doctrine of "non-recognition." In the writer's opinion, the "non-recognition" doctrine should be confined in its scope to that of an instrument of political policy, and the practical consequences flowing from the doctrine should be dealt with by appropriate national legislation as occasion demands.

C. Fred Fraser.

DESCRIPTION OF A PORTION OF A QUARTER SECTION FOR TRANSFER PURPOSES

Clients frequently buy or sell a small parcel of land which they will desire you to carve out of a quarter section by metes and bounds. This type of conveyancing does not lend itself to the standardization which has encouraged the production and sale of the "type form" so dear to the heart of the lay conveyancer and procurable from dealers in stationery supplies. There are nevertheless some convenient methods of description in use in the province and acceptable at the Land Titles Office. Mr. W. E. Zinkan, Surveyor to the Land Titles Office, has kindly consented to prepare the following forms, elementary information, and general advice for the benefit of the recent graduate who may suddenly find himself called upon to draft such a transfer. No attempt has been made in the material which follows to cover every variation in description which the needs of particular clients may present: the forms illustrated will, however, provide a foundation upon which the student may build whatever variations any particular situation calls for with confidence. When in doubt, communicate with the Land Titles Office instead of drawing an unacceptable description, which will create trouble for you and your client.

I.

For the sake of convenient reference the following tables of frequent use in land measurement are here inserted:

One Rod equals 16.5 Feet
4 Rods equals 1 Chain
1 Chain equals 66 Feet
43560 Square Feet equal 1 Acre
160 Square Rods equal 1 Acre
10 Square Chains equal 1 Acre

A Quarter Section is 40 chains or 160 rods or 2640 feet *more or less* on every side. Therefore a one-rod strip across a Quarter Section will equal one Acre *more or less*.

Illustration I (a)

Suppose a very simple case: your client has agreed to sell a Thirty Acre strip off the southerly portion of his Quarter Section. The following description would carry his intention:

The most southerly Thirty (30) Rods throughout of the North West quarter of section Four (4), Township Thirty-six (36), Range Six (6), West of the Fourth Meridian: containing Thirty (30) Acres more or less.

Illustration I (b)

Now your client wishes to convey what he has left. Your description would read as follows:

All the North West quarter of Section Four (4), Township Thirty-six (36), Range Six (6), West of the Fourth Meridian, except thereout the most southerly Thirty Rods throughout. The land herein described containing One Hundred and Thirty (130) Acres more or less.

This method of describing the remaining portion is applicable to all cases in which part of a surveyed lot, block, quarter-section or other parcel of land has been taken out of any parcel of land by previous transfer.

Measurements generally should be expressed in Feet or Chains. The use of Rods is undesirable; the only place they seem to fit is given in Illustration I above. The use of inches or yards should be avoided. Decimals of Feet or Chains are standard usage; use them always in preference to fractions. Above all else avoid mixed units of measurement. If you express your first measurement in Chains, continue in Chains throughout your description. Similarly, if you express your first measurement in any other unit of measurement, continue throughout with the same unit of measurement.

Illustration II (a)

Your client owns the North East Quarter of Section Seven, Township 45, Range 6, West of the Fourth Meridian. He has agreed to sell an Acre out of the North East corner of his Quarter to A, and asks you to draw the transfer. See compilation plan, Figure 1. Your description of the parcel will read as follows:

All that portion of the north east quarter of section seven (7), Township forty-five (45), range six (6), west of the fourth meridian, in the Province of Alberta, described as follows:

Commencing at the north east corner of the said quarter section; thence westerly along the north boundary thereof two hundred and eight and seventy-one hundredths (208.71) feet; thence southerly and parallel with the east boundary of the said quarter section two hundred and eight and seventy-one hundredths (208.71) feet; thence westerly

and parallel with the said north boundary to the said west boundary; thence northerly along the said west boundary to the point of commencement. The land herein described containing One (1) acre more or less.

Illustration II (b)

The next day your client agrees to sell to B a little less than four acres, parcel B (see plan, Figure 1). Your description of the parcel conveyed will read as follows:

All that portion of the North East quarter of section seven (7), township forty-five (45), range six (6), west of the fourth meridian, in the Province of Alberta, described as follows:

Commencing at a point on the north boundary of the said quarter section four hundred and twenty (420) feet westerly from the north east corner thereof; thence southerly and parallel with the east boundary of the said quarter section four hundred and twenty-five (425) feet; thence westerly and parallel with the said north boundary four hundred (400) feet; then northerly and parallel with the said east boundary to the said north boundary; thence easterly along the said north boundary to the point of commencement. The land herein described containing Three and ninety-two hundredths (3.92) acres more or less.

Note that these descriptions neatly carry the land intended to be transferred without unnecessary verbiage. The measurements of two sides only are expressed since the opposite sides of a parallelogram are equal. The common phrase "to a point" is avoided because it is obvious that one must stop at a point in a line. Similarly, the phrase "a distance of" is avoided since it is understood that distance is what is being measured.

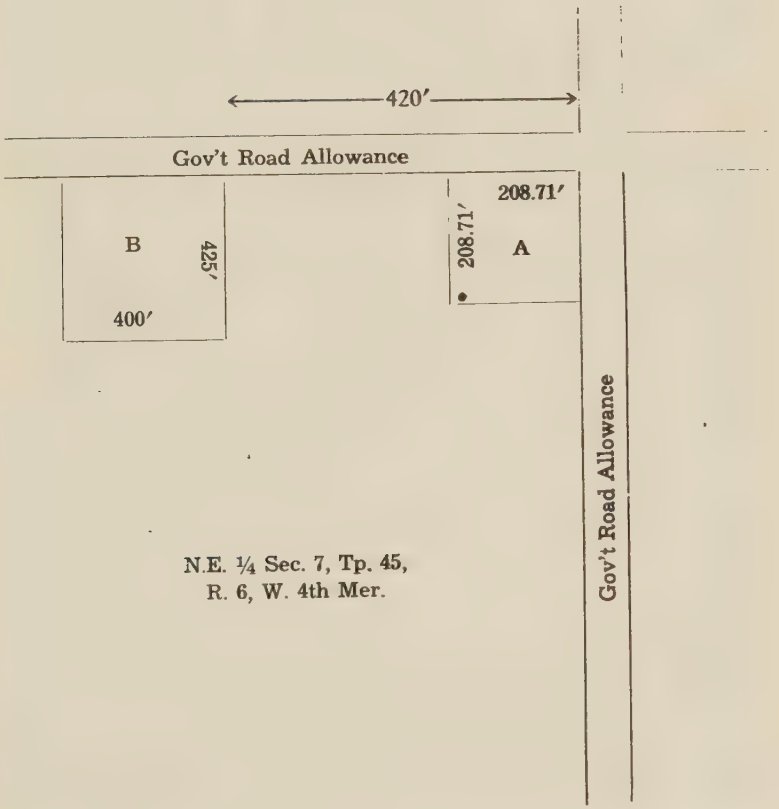
II.

And now for convenience of exposition and emphasis we put last what you must do first. Carefully search the title at the Land Titles Office. If the title is for a full Quarter Section with no exceptions your task is relatively easy. The exceptions may be a parcel by description (see illustrations above), a surveyed road, a railway right of way, a subdivision plan, or for a parcel for which a plan has been filed under Section 66 of the Land Titles Act. A search of the exceptions by descriptions must be made, and copies of all parcels surveyed and registered in the Land Titles Office must be examined to determine whether any such deductions will

affect the land you wish to describe. After you satisfy yourself that the land you wish to convey is left in the Title from which it is to be conveyed, proceed with the highest degree of care and diligence, remembering that your ideal of yourself as a skilled draftsman is at stake in even the smallest matters, and that you have a background of knowledge unavailable to the amateur conveyancer. See that you make the most of it.

W. E. ZINKAN.

Fig. 1



BOOK REVIEW

PROSSER ON TORTS—West Publishing Co., St. Paul Minn. pp. xiii, 1309, $4.50.

This is a good book, a very good book, the best text book on the subject that I have seen. Although its chief virtue is by no means the amount of information packed into its 1127 pages of text, it does cover a surprising amount of ground and its footnotes lead out into a rich field of interesting and useful cases. The condensed style in which the book is written does not lend itself to elaborate analysis. In this connection Mr. Prosser has attempted two things. (1) He has stated the conclusions reached by the best current analysis with a minimum of argument calculated to give his readers an insight into it. At the same time he has enriched his book with full reference to the storehouse of the best, almost the only, published analysis—the legal periodical.

The book bears the deep impress of Mr. Prosser's modern law school approach to law. The Anglo-American world is almost unconsciously conceived of as a commonwealth transcending state and national boundaries; while in the foreground Mr. Prosser is consciously always aware of the heterogeneity of local jurisdictions, each capable of enunciating good, bad and indifferent rules of law, and on occasion entitled to different rules because of variations in economic development. Within this framework the author shows that it is quite possible to write a straightforward treatment of such a comprehensive subject matter as the current law of torts. Where the law throughout the generality of jurisdictions is uniform and clear a bold statement is made and backed impartially by English and American citations. As the fringes of doctrine are approached the author becomes more critical and cautious in both text and footnotes. The reader is led to see just how far development has gone and in what jurisdictions and whether with or without the author's approval. All of which is as refreshing and stimulating as it is truly informative and unusual for Canadians accustomed to texts which generally assume a static single jurisdiction, in which the law never changes but is occasionally "clarified" by rephrasings in fresh quotation marks.

The treatment of the problem of the extent to which a negligent defendant is liable for the harms in fact caused by his negligent acts is the most fruitful (although the treatment of Res ipsa loquitur is a

splendid piece of work) and perhaps the most controversial portion of the book. It is in this discussion that the book makes its most significant contribution, and yet this is the one part of the book with which I must take friendly issue. That the use of the word "cause" covers a multitude of policy considerations is recognized, as is also the fact that this language habit results in much bewilderment and confusion. So far the author is entitled to congratulations. But the word cause is only half of the difficulty, and Mr. Prosser retains the notion that negligence involves the breach of a duty to be careful. All that the idea of duty can do is to furnish a confusing description of the fact that in certain relationships the courts have recognized that certain risks are undue, and that fact can be better expressed in that simple fashion.

This duty concept gives Mr. Prosser difficulty with the basis of the disentitling effect of the plaintiff's conduct in contributory negligence cases. For instance:

> "It is perhaps unfortunate that contributory negligence is called negligence at all. Contributory fault would be a more descriptive term. Negligence is commonly understood as conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the actor himself. Negligence involves a duty, an obligation of conduct to another person. Contributory negligence involves no duty, unless we are so ingenious as to say that the plaintiff is under an obligation to protect the defendant against liability for the consequences of his own negligence."

My point is that this notion which to Mr. Prosser is an unjustifiable rationalization is neither more nor less so than is the ordinary description of negligence as a breach of duty, the duty being established by the fact that the defendant is liable. We do not know whether there is a duty until we know whether the defendant is liable, and then the duty concept adds nothing useful to our knowledge.

It seems that Mr. Prosser having escaped from the orthodox confusion which treats "cause" as the solvent in contributory negligence cases has impaled his thought on the sterile concept of "duty". If the defendant incurs liability to the plaintiff on the ground that he has created undue risks of harm to him, that same ground should be sufficient reason to reduce the plaintiff's recovery against the defendant in respect of harms as to which he himself has created undue risks. And we need confusion from

neither causation nor duty. That there should have been a time and that there still are places where the plaintiff is completely barred or else recovers all on some form of last clear chance doctrine is merely one of those historical accidents calling for an historical explanation. (See The Rationale of Last Clear Chance, 53 Harv. L. Rev. 1225.)

Mr. Prosser carries the duty concept further. He would use it in determining the extent to which a defendant in liable for harms in fact caused by his negligent conduct in cases in which no problem of the plaintiff's contributory negligence is involved. See page 341:

> "It would be simpler and more correct to state the problem in terms of duty: is the defendant under legal obligation to protect the plaintiff against such unforseeable consequences of his negligent acts?"

Notice that duty is here used in a new sense, the sense of avoiding certain consequences after having by hypothesis engaged in conduct which made those consequences inevitable although antecedently unforseeable.

"Protect against" may mean compensate for. This reduces the statement to: is the defendant liable? and could clear the ground for conscious policy considerations, which appears to be Mr. Prosser's purpose. But this statement of the problem, cast as it is in terms of duty, is apt in the hands of lesser men to result in another instance of the prevalent practice of stating a conclusion as if it were a reason leading to that conclusion.

On page 212 Mr. Prosser follows Mr. Bohlen in stating that "the only valid objection against recovery for mental injury (negligently caused) is the danger of vexatious suits and fictitious claims . . .", and concludes that as our skill in proof of neuro-medical matters increases recovery in such cases should be allowed. To me the problem is more complicated. The victim's knowledge of the prospect of financial recovery will increase the injury to the victim. This is what is known as compensation neurosis. Usually it is real and the victim does not develop it intentionally. If we compensate for it we increase human suffering until payment made, and we increase the burden on the defendant. On the other hand, if we deny recovery for purely mental injury we fail to compensate for some direct consequences of the defendant's negligence. There is a solution to the problem which may or may not be a desirable one, but which runs counter to the implications of the *Polemis* (1) case. At the

(1) In Re Polemis & Furness, Withy & Co., 1921 3 K.B. 560.

same time it fits neatly into the framework of the *Palsgraf* (2) case, of which Mr. Prosser does not think as highly as I do. Mental shock with or without impact happens often enough to be antecedently forseeable and happens with impact more frequently than without, but in neither case is the frequency high. It is still a rare rather than a normal risk. The law might conceivably take the viewpoint that negligent conduct which threatens physical injury does not materialize in purely mental injury with sufficient frequency for us to say that the defendant has been negligent with respect to that type of harm and is therefore not liable for it. I realize that if this idea were generalized it would mean scrapping the Polemis case and going back, so far as results are concerned, toward the old natural and probable consequences rule. That may or may not be desirable on other grounds, but we should not forget two things about the Polemis case. (1) In the first place it was decided on an irresponsible statement from *Smith v. London and South Western Railway* (3). (I say irresponsible because the question before the court was not whether there was liability for unforseeable consequences, but whether there was evidence in the case from which the jury could reasonably conclude that the defendant should have anticipated that the fire might spread to the plaintiff's cottage. The judges made the statements regarding liability for unforseeable consequences with apparently no realization that that question was not before them.) (2) The Polemis case gained acceptance in an age when many people would say (rightly or wrongly) that an explosion and fire is what is to be expected when a plank is dropped down the hold of a ship known to be filled with benzine vapor. There is a tendency for us in approving the Polemis case to reject (unconsciously) its hypothesis.

Mr. Prosser's book is complete with a table of cases and a good index and it is elaborately cross-referenced. Although the style is tersely expository the reader will be grateful to find an occasional unexpected sally. As the preface states, the material was read in manuscript by Professor Warren A. Seavey, which is recommendation enough for any book.

M. M. MacIntyre.

(2) Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).
(3) Smith v. London & S.W. Railway Co., L.R. 6 C.P. 14 (1870).

SIR MATTHEW HALE

It is probable that no man as learned, as pious, and as just as Sir Matthew Hale has ever occupied the office of Lord Chief Justice of England. Coke had as much professional knowledge, according to Lord Campbell, but whereas Coke regarded the law as a mass of arbitrary rules, Hale cultivated law as a science, finding for each rule its place in a general scheme.

Oddly enough, it was quite by accident that Matthew Hale came to the study of law. Born in Gloucestershire in 1609, he was left an orphan at the age of five, and from that time was raised by a Puritan clergyman. It was thought the pious youth should also become a divine, and to this end he entered Magdalene Hall, Oxford, at the age of sixteen. But after two years of arduous theological studies, Hale suddenly forsook his books for the frivolities of university life. Tall and strong of body, he became an adept at fencing and, abandoning all thought of becoming a clergyman, resolved to be a soldier. At this time he came into contact with Serjeant Glanville, and this great counsel succeeded in dampening the young man's military ardor and persuaded him to enter Lincoln's Inn. Here Hale applied himself to study sixteen hours a day, reading all the reports, year-books, and legal treaties several times over. The only relaxation the self-denying student allowed himself was a change of study, and as a result he became well versed in philosophy, history, mathematics and anatomy.

Such was Hale's reputation as a student that he found himself in full practise immediately after his call to the bar, and within a few years he reached the top of his profession. As a leader at the bar he took part in many famous state trials, defending such notables as Archbishop Laud and the Duke of Hamilton.

In spite of Hale's open leanings towards the Royalists, Cromwell in 1652 offered him a judgeship in the Court of Common Pleas. Hale accepted, and sat in the Common Pleas until the Protector's death, refusing a new commission offered by the weak Richard.

Matthew Hale did not take such an active part in politics as to earn him the name of statesman, although he did exert considerable influence in Parliament when he sat. There is no telling to what heights Hale might have risen as a statesman had he not clung so tenaciously to the middle road throughout those revolutionary times. So popular was he with the voters, that constituencies fought over the privilege of returning him. In 1660,

Hale was the author of the Comprehension Bill, and it was apparent to Charles II and Clarendon who opposed the Bill, that Hale would succeed in piloting it through the House of Commons. Conveniently, a vacancy occurred in the office of Chief Baron of the Exchequer, so the position was offered to Hale and he accepted.

He remained Chief Baron for eleven years, and according to Lord Campbell "he is certainly to be considered the most eminent judge who ever filled this office." His knowledge of Equity was as sound and as extensive as his knowledge of law, and Lord Nottingham, the father of Equity, worshipped Hale as a great master. In 1671, Sir Matthew became Lord Chief Justice of the King's Bench. In such esteem was he held as a judge that the greater amount of court business followed him from the Common Pleas to the Exchequer, and from the Exchequer to the King's Bench.

What contributed to Hale's greatness as a judge? Certainly his vast knowledge of the law both English and Roman, coupled with a passion to do justice to all persons who came before him. And his piety, his compassion, his even temper, his honesty and patience; these characteristics together with a mind that was keenly analytical and his capacity for ceaseless toil, all went to make him a great man and a great judge.

His writings which were extensive and were by no means confined to law, are of little importance today. However, one work supplied Blackstone with the plan and foundation for his "Commentaries." Always an advocate of constant legal amendment, Hale wrote a treatise in support of the establishment of a land registration system.

Ill-health forced Sir Matthew Hale to resign in 1676, and he died in the same year at his home in Gloucestershire. Lord Campbell has said, "in the list of our great magistrates there is no name more venerated than Hale . . ." The reason for this veneration is easily seen.

J. H. Corbett.

Sir Matthew Hale

The History of the Rule in Russell v. Russell

The common law rule promulgated in *Goodright v. Moss* (1) to the effect that neither spouse may give direct evidence of non-excess which will tend to bastardize the issue conceived and born during the subsistence of the marriage, was decided by the House of Lords, in *Russell v. Russell* (2), the court dividing three-to-two, to apply in actions for divorce in which the husband relies on establishing the illegitimacy of a child, born to the wife, to prove adultery. Originally, the rule had grown out of those cases in which legitimacy proper was the issue. That is, the direct question was one of legitimacy, as in the Goodright case to prove a claim to property; as in *Rex v. Rea* (3) and *Rex v. Sourton* (4) to determine pauper settlement; and as in the *Aylesford Peerage Case* (5) and the *Paulett Peerage Case* (6) to determine the succession to a peerage. Consequently, as historically the rule emerged in relation to some form or other of bastardy proceedings, it did not necessarily follow that it should extend and apply to those cases, such as divorce, in which the prime issue is not one of legitimacy but of adultery. Or, in other words, the fact that legitimacy in this latter class of case is merely a secondary consideration might have been made the basis for distinction for the purpose of mitigating the rigors of the rule. In point of fact, this is precisely what the Divorce Court, probably unconsciously, had done, for, during and following the Great war, there were literally hundreds of cases (7) in which the soldier-husband, petitioning for divorce, to establish adultery, merely had to predicate that he had been in active service for a period greater than nine months, and that his wife had given birth to a child at a time, which established, having regard to the period of gestation, that he could not possibly be the father, *Gaskill v. Gaskill* (8). In this latter case, such evidence was adduced by the petitioner and received without question by Lord Birkenhead, L.C. (9).

(1) 98 E.R. 1257; 2 Cowp. 591.
(2) 1924 A.C. 687.
(3) 11 East 132.
(4) 5 Ad. & E. 180
(5) 11 A.C. 1.
(6) 1903 A.C. 395.
(7) Halsbury 2nd Ed. Vol. 10 p. 663 Note (q).
(8) 37 T.L.R. 977.
(9) But in Russell v. Russell, Lord Birkenhead takes pains to show that the matter was not argued.

However, the unique and peculiar circumstances of the Russell case provided the opportunity to call in question this practice of the Divorce Court, for, whereas in the "soldier" cases, the non-access was proved by the conclusive evidence that the petitioner had at the relevant times been beyond the seas, in the Russell case the husband adduced evidence of non-access even though he and his wife had been occupying the same bed. It took such extraordinary, if not thoroughly indecent and repulsive, facts to shock the court into considering the question of the admissibility of evidence in divorce which had long ago been held inadmissible in issues of legitimacy, *Goodright v. Moss*. These extraordinary facts were as follows. The Hon. John H. Russell had presented a petition for divorce relying on an alleged adultery with a man unknown, as a consequence of which a child had been born. The wife was in fact impotent and had never successfully performed the complete sexual act, and the child of which she had been delivered had been conceived by fecundation *ab extra*. Abortive coitus had been habitually practised by the spouses, but the petitioner sought to testify that the act had not been performed on the two nights on which he had slept with his wife and on which occasions, medical evidence showed, the child might have been conceived. In short, the husband sought to give direct evidence of non-access tending to illegitimize a child for purposes of proving adultery. The President, overruling an objection of the Respondent's Counsel, admitted the evidence and granted a *decree nisi*, which decision was upheld on appeal to the Court of Appeal. The House of Lords, by a majority of three-to-two, held that they were bound by the judgment of Lord Mansfield as given in *Goodright v. Moss*, and accepted in *Rex v. Rea, Rex v. Sourton, The Aylesford Peerage Case* and the *Poulett Peerage Case*, and held the evidence inadmissible. The pertinent words of Lord Mansfield are, firstly, the following, at page 592, delivered in the course of the argument:

> "The law of England is clear, that the declarations of a father or mother cannot be admitted to bastardize the issue born of the marriage,"

and, secondly, the following, at page 594, delivered in the course of the judgment:

> "As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded on decency, morality and policy that they shall not be permitted to say after

marriage, that they had no connection, and therefore that the offspring is spurious."

In commenting on this decision the Earl of Birkenhead had this to say:

"The rule as laid down is not limited to any special class of case. It is absolutely general in the comprehensiveness of its expression. It has no geographical qualification. . . . It says, upon the contrary, that such evidence shall not be given at all; and the reason given is that it would tend, if given, to bastardize the issue and to invade the very special sanctity inherent in the conjugal relation" (10).

And Viscount Finlay, dealing with the reception of such evidence by the Divorce Court, expressed himself as follows:

"It appears that in the Divorce Court a practice has grown up of admitting such evidence by husband and wife, to the extent of allowing proof by them as to absence at the material time. The question now arises whether this practice is right. I have given my reasons for thinking that it is erroneous and that the rule excluding such evidence is not confined to 'legitimacy cases', . . . and that its application extends to all evidence of non-access" (11).

Despite the unequivocal statement of the law by the majority in *Russell v. Russell,* the courts, motivated by their dislike of the rule, with its attendant hardships, at once ingeniously commenced creating exceptions, with the result that from 1924, which is the date of the Russell case, to 1939 there appeared a whole series of cases by which it seemed that the rule was to be rendered nugatory. To illustrate this systematic and protracted encroachment it is our purpose now to examine chronologically the relevant cases.

In *Andrews v. Andrews and Chalmers* (12) while a husband and wife were living apart under a separation order granted by the Magistrates, a child, which must have been conceived during the subsistence of the order, was born to the wife. The husband petitioned for divorce and sought to have admitted in evidence statements of the wife that the co-respondent was the father of the child (13). Horridge, J., admitted the evidence, stating that, on the authority of *St. George's v. St. Margaret's*

(10) Russell v. Russell 1924 A.C. 687, 698.
(11) Russell v. Russell 1924 A.C. 687, 718.
(12) 1924 P.D. 255.
(13) But see the discussion under Warren v. Warren (28).

(*Parishes of*) (14), and *Hetherington v. Hetherington* (15) the rule does not apply in cases in which the spouses are living apart under a judicial order.

Next followed *Mart v. Mart* (16), a case in which the parties were living apart, not under judicial separation, but under a deed of separation. Bateson, J., purporting to base his judgment upon *Hetherington v. Hetherington,* decided that, where parties are living apart under a deed of separation, the presumptions of access and legitimacy are rebutted, as they are where the parties are separated by a decree of the court, and he therefore held that the evidence of the husband as to his non-access, which had been excluded in the Russell case, could in these circumstances be received. It appeared, however, that this progressive development was to be arrested at this point, for Luxmoore, J., in the Chancery Division in *Re Bromage, Public Trustee v. Cuthbert* (17) disapproved of and refused to follow *Mart v. Mart,* stating that it was inconsistent with the decision of the House of Lords in *Morris v. Davies* (18). In the year 1937, nevertheless, the way was cleared of the barricade created by Mr. Justice Luxmoore. The case in question was *Stafford v. Kidd* (19) in which a married woman, living apart from her husband under a deed of separation, complained before the justices under the Bastardy Act, against the defendant as the father of her illegitimate child. As proof of the illegitimacy, the wife proposed to give evidence of the non-access of her husband, but such evidence was held inadmissible by the justices, applying the rule in *Russell v. Russell;* and the case came by way of appeal before Lord Hewart, C.J., in the King's Bench Division. The learned Chief Justice, disapproving of *Re Bromage,* chose to follow *Mart v. Mart,* and admitted the direct evidence of non-access, reiterating the decision of Bateson, J., that a deed of separation had the same effect as a judicial separation in rebutting the presumption of legitimacy and thereby escaping the *Russell v. Russell* rule.

If we pause to recapitulate at this point, we see that in cases in which the spouses are living apart under a judicial order or decree, or under a deed of separation, by virtue of the law as it stood at the time of

(14) 1 Salk. 123.
(15) 1887 12 P.D. 112.
(16) 1925 P.D. 24.
(17) 153 L.T. 313.
(18) 5 Cl. & F. 163.
(19) 1937 1 K.B. 395.

Stafford v. Kidd, the rule in the Russell case did not apply. However, it is interesting to intercalate here that maintenance orders were not treated as having the same effect, for Mr. Justice Hill in *Rimmer v. Rimmer* (20), and Lord Hewart, L.C.J., in *Bowen v. Norman* (21) refused to entertain direct evidence by the spouses of non-access despite the existence of the above-mentioned orders. The interesting question which remained next to be answered in this development was the one relating, not to formal agreements of separation manifested by deed, but to those informal arrangements by which husband and wife had verbally agreed to live apart. In other words, had the informal the same substantial effect as the formal separation agreement?

This matter had to be adjudicated upon by the Divorce Court in the year 1939 in *Ettenfield v. Ettenfield* (22), a case in which the husband and wife were separated by an informal agreement, evidence of which appeared in letters exchanged between the parties. The President held that this informal agreement, as far as the rule in *Russell v. Russell* was concerned, had precisely the same effect as the more formal types, and, following *Mart v. Mart* and *Stafford v. Kidd,* he admitted the husband's direct testimony of non-access.

Had the law crystalized at this stage, it is manifest that the rule of evidence, which was set out in Goodright's case in 1777, and which was applied to divorce proceedings by the House of Lords in *Russell v. Russell* in 1924, would have been almost completely destroyed. For the practical consequence of the President's decision in the Ettenfield case was to the effect that if the spouses, or either of them, could show that they had been living apart not only under a judicial order or deed of separation, but if they could prove the existence of a mere oral agreement to live apart, such was sufficient to emancipate them from the rule precluding them from giving direct evidence.

However, the continuance of this state of affairs was not to be, and the President was not to have the last word in the matter, for the Ettenfield case was taken before the Court of Appeal in 1940 (23) where a minute examination of the authorities, with special emphasis upon *Hetherington v.*

(20) 46 T.L.R. 624 (Note).
(21) 1938 2 A.E. 776.
(22) 1939 P.D. 377.
(23) 1940 1 A.E. 293.

Hetherington, was made. Goddard, L.J., in his comprehensive, yet succinct, judgment took the view that the words of the Earl of Birkenhead in the Russell case are absolute:

> " 'The rule as laid down is not limited to any special class of case. It is absolutely general in the comprehensiveness of its expression. It has no geographical qualification'," (24),

and proceeded to overrule *Mart v. Mart,* and *Stafford v. Kidd,* while approving of the judgment of Luxmoore, J., in *Re Bromage, Public Trustee v. Cuthbert,* and distinguishing *Hetherington v. Hetherington. Andrews v. Andrews* is not the subject of special mention, yet, nevertheless it falls within the ambit of Goddard, L.J.'s decision, and is thereby rendered, on its reasoning, no longer law (25). To summarize this sweeping but nevertheless precisely logical effect of the learned Lord Justice's judgment, we cannot do better than to use his own words:

> "(1) The rule that evidence tending to bastardize or legitimize a child conceived and born during wedlock cannot be given by either spouse is absolute, and applies, not only where the parties are living together, but also when they are separated either by a decree of a court of competent jurisdiction or by their own volition.
>
> "(2) Where the only evidence of adultery in support of a husband's petition is the birth of a child to the wife, if the parties have been separated by the decree or order of a competent court, the husband need prove no more than the date of the decree or order, and the date of birth of the child. If it must have been conceived after the date of the decree or order, there is a *presumptio juris* that it is a bastard. The wife may rebut this presumption if she can, but she must do it by evidence other than her own.
>
> "(3) Where the only evidence is as mentioned in the last paragraph, and the parties have voluntarily separated, whether by deed, writing under hand, oral agreement, or agreement implied from conduct, the husband cannot give evidence of non-access, but he can prove that fact by any means open to him other than his own evidence. The presumption is that the child is legitimate. If the husband leads evidence to

(24) Ettenfield v. Ettenfield 1940 1 A.E. 293, 298.
(25) But see the discussion under Warren v. Warren (28).

rebut that presumption, the wife can call but cannot herself give, evidence in support of the child's legitimacy" (26).

This unequivocal pronouncement, which we have quoted at some length, swept aside that series of cases, which had gone such a long way in derogating from the rule in *Russell v. Russel,* and once more re-established the law in 1940 as it had been laid down by the House of Lords in 1924.

But, at this juncture, a question of more than mere academic pertinence presents itself for investigation and solution. As the rule in *Russell v. Russell* is so comprehensive and peremptory, on what authority could it be evaded by the Divorce Court in *Andrews v. Andrews,* and *Mart v. Mart,* and by the King's Bench Division in *Stafford v. Kidd?* The answer is to be found in the consideration of *Hetherington v. Hetherington,* and *St. George's v. St. Margaret's* on which the former case is based. In the interests of clarity, we shall treat these two cases in some detail.

St. George's v. St. Margaret's is a case in which a wife, separated from her husband by a divorce *a mensa et thoro,* was cohabiting with another man to whom she bore children. We shall quote from the judgment of Holt, C.J.:

> "When a woman is separated from her husband by such a divorce, the children she has during the separation are bastards; for we will intend a due obedience to the sentence, unless the contrary be shown; but if a baron and feme without sentence part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved; for access shall be intended; but if a special verdict find the man had no actess, it is a bastard."

This was the law laid down in 1706—that a divorce *a mensa et thoro* not only had the effect of rebutting the presumption of legitimacy but also of establishing a contrary one of illegitimacy; but that separations other than those granted by judicial authority had no such result. There was not the minutest suggestion that the spouses were competent to give testimony of non-access.

In *Hetherington v. Hetherington,* a husband living apart from his wife under the equivalent of a judicial separation, had made application to the justices to set aside a maintenance order on the grounds of his wife's adultery, evidenced by the birth of a child more than nine months subse-

(26) Ettenfield v. Ettenfield 1940 1 A.E. 293, 301.

quent to the separation. However, the justices refused to receive the husband's evidence of non-access, or evidence of the wife's admissions that the applicant was not the father. Application was then made to the Probate Division where the President, Sir J. Hannen, though ultimately dismissing the action on a question of jurisdiction, made, in the course of his judgment, this observation:

> "There is no doubt that from the time such an order is made—which is equivalent to a judicial separation and the ancient divorce *a mensa et thoro*—the parties are authorized to live apart, and from that moment all the presumption which exists in the case of married persons as to access and the legitimacy of the children is reversed. If a child is born more than nine months after the separation, it is presumed to be illegitimate, unless it be shown as a matter of evidence that the husband and wife have come together again. That has been long settled by the case referred to in Salkeld (14) and if it had been taken into consideration by the magistrates when the matter was before them the result might have been different. Unfortunately in refusing to act on the evidence of the parties, they seem to have been under the impression that the issue was one of bastardy, which it was not, but one of adultery."

This excerpt from the judgment does not leave us in doubt that the President adopts *in toto* the proposition that there arises from judicial separation a presumption of illegitimacy affecting issue conceived and born during the subsistence of the separation, as laid down by Holt, C.J., but there appears to be a further suggestion here, and one which certainly cannot be attributed to anything said in *St. George's v. St. Margaret's,* viz., that the justices erred in not admitting the evidence of the spouses. True, the language is not explicit, for rather, it is ambiguous, but it does seem to convey not only the impression that different conditions arise in bastardy than in adultery, with which we do not wish to deal, but also the more unusual idea that the rule precluding the spouses from giving evidence is inapplicable in cases where there is judicial separation. That is, the otherwise inadmissible evidence will be received under circumstances where there exists a presumption of illegitimacy. Whether in fact this is what was intended to be laid down is difficult to ascertain, but it is quite clear that such an interpretation was accepted and applied in *Andrews v. Andrews, Mart v. Mart,* and again in *Stafford v. Kidd.* Of course *Russell*

v. Russell had in reality disposed of the matter for in dealing with and confirming the judgment in *Hetherington v. Hetherington,* Viscount Finlay expressed himself in the following manner:

> "Nothing was said by Sir J. Hannen in approval of the practice of the Divorce Court as to the admission of evidence such as that now under consideration. Indeed, it appears from all the three reports of the case that he pointed out with some fullness that the separation order had the effect of a judicial separation, that all presumptions arising from the state of marriage were at an end, and that any child born more than nine months after the separation was presumed illegitimate" (27).

Goddard, L.J., came to a similar conclusion in his consideration of *Hetherington v. Hetherington* in *Ettenfield v. Ettenfield.*

Notwithstanding Viscount Finlay's lucid pronouncement, however, apparently Mr. Justice Horridge in *Andrews v. Andrews,* relying, and correctly so, on *St. George's v. St. Margaret's,* held that the separation order established a presumption of illegitimacy; and, relying on *Hetherington v. Hetherington* with the confidence that it had been the subject of affirmation in *Russell v. Russell,* but without noting the strict qualification there, he held, erroneously, that a presumption of illegitimacy and the rule prohibiting the giving of evidence by the spouses are mutually exclusive.

Mr. Justice Bateson, in *Mart v. Mart,* fell, in a similar manner, into this identical error, and at the same time, committed the further mistake, directly in the face of what is clearly set out in *St. George's v. St. Margaret's,* in holding that in establishing a presumption of illegitimacy a deed of separation has the same effect as a judicial order or decree. This decision was followed, as we have seen, in the King's Bench Division in *Stafford v. Kidd,* and again, with a further extension, in the Probate Division in *Ettenfield v. Ettenfield.*

This, we submit, is a true explanation and an authentic description of the aberration which was initiated by the Divorce Court in 1924, and which was corrected by the Court of Appeal in 1940.

Perhaps no treatment of this subject—the rule in *Russell v. Russell*—would be complete without some mention of those cases which we might

(27) Russell v. Russell 1924 A.C. 687, 717.

loosely describe as exceptions to the rule, or more correctly as those cases to which the rule does not extend and apply.

(1) In *Warren v. Warren* (28) the only evidence of adultery offered by the husband was a confession by the wife that she had committed adultery, and in consequence of which she was pregnant. In fact a child in due course had been born. Mr. Justice Swift admitted the evidence, holding that it did not offend against the rule in that, by virtue of the presumption of legitimacy of issue born in wedlock, no evidence whatsoever, other than that of non-access, can have the effect of illegitimation. At page 112 the learned Judge expresses himself thus:

> "However many men she has had connection with, nothing can bastardize the child unless non-access of or non-intercourse by the husband can be proved. Her evidence and proof of her conduct and statements are admissible unless and until it is sought to prove by these means non-access or non-intercourse."

It is respectfully submitted that this is perfectly sound. A child born during the subsistence of a marriage is presumed in law to be legitimate, which presumption can be rebutted only by proof of non-access of the husband (29). The admission by a wife of her having committed adultery, or of her being pregnant by another man has nothing to do with non-access. In following this case Mr. Justice Hodson, in *Frampton v. Frampton* (30) in the year 1940, said:

> " . . . but it appears to me that it does not make any difference in principle whether she simply says: 'I have committed adultery', or she says: 'I am pregnant by another man'. That, I think, is what Mr. Justice Swift was, in effect, saying."

Lord Justice Goddard in his judgment in *Ettenfield v. Ettenfield* expressly cautioned that he did not cast any doubts on the correctness of the decision in *Warren v. Warren*. On the basis of this principle it is interesting, and perhaps requisite, to note that that part of the evidence which consisted of the wife's admission of adultery in *Hetherington v. Hetherington,* and the wife's admission that the co-respondent was the father of her child in *Andrews v. Andrews* would be admissible.

(28) 1925 P.D. 107.
(29) Russell v. Russell 1924 A.C. 687, 705.
(30) 57 T.L.R. 260.

It is convenient and proper under this same head to discuss another case—one of criminal law—*Rex v. Carmichael* (31). The accused had been convicted on a charge of incest with his daughter, and the case came before Mr. Justice Charles by way of appeal on the question of whether or not the trial judge had been correct in excluding the evidence of the accused to the effect that his wife had told him that the daughter born in wedlock was not his but the daughter of another man. The learned judge quashed the conviction, holding that the rule in *Russell v. Russell* did not apply to such a case, in that the evidence was not offered to prove that the girl was illegitimate, but merely to show that the accused believed her to be such, and therefore to negative *mens rea*. While we agree unreservedly with the reasoning in this decision, we submit, with deference, that the same conclusion could have been reached on the basis of the wider principle in *Warren v. Warren,* viz., that an admission by a wife of her having been delivered of a child not her husband's, does not offend against the rule so long as she does not speak of non-access.

(2) The rule does not apply in cases in which the child, which would be prejudiced by the evidence, is still-born. In *Holland v. Holland* (32) the husband sought to establish his wife's adultery by offering in evidence the fact of the birth of the still-born baby, and of his own non-access. Mr. Justice Swift received the evidence. This case is followed in the Supreme Court of Alberta (Appellate Division), in *Roberts v. Roberts* (33) where a husband brought forward the wife's confession of her pregnancy by a stranger and then proceeded to give testimony of his own non-access. Mr. Justice Beck upheld the lower decision of Mr. Justice Mitchell admitting the evidence. However, on the authority of *Warren v. Warren,* it would seem that the wife's admission alone is enough, and that the effect of evidence of non-access stands or falls with the truth of the confession; but if the wife's statement is true, then proof of adultery follows as an inevitable consequence, and evidence of non-access is tautological or even irrelevant. Of course such does become necessary and relevant in the procedure of corroborating the veracity of the wife and the truthfulness of her statement. That is, when the fact of her pregnancy has been substantiated by other evidence, then to prove that another man was re-

(31) 27 C.A.R. 183 (1940).
(32) 1925 P.D. 101.
(33) 1928 1 D.L.R. 227.

sponsible, evidence of the husband's non-access would have to be adduced. But, we reiterate, this would become necessary only in corroboration. However this may be, in any case, entirely apart from its efficacy, the evidence is admissible.

(3 Conduct of the spouses as tending to show that they had treated a child as illegitimate is admissible in evidence. For example, conduct such as the wife's concealing the child from the husband; such as the husband's completely ignoring, abusing, or making no provision by will for, such child. (*Morris v. Davies; Aylesford Peerage Case.*) In relation to this matter Lord Bramwell at page eleven in the latter case makes this observation:

> "Whatever reason there is for the parent not giving evidence in the witness-box to bastardize the child, that is a reason that does not apply as to the evidence given of the conduct of the parent showing that the child was a bastard."

And again at page twelve:

> "It would be the conduct of the parent that would be given in evidence for the purpose of bastardizing the child of the wife begotten during marriage."

Of course, in such a situation as this, the evidence admitted is not that of non-access, and therefore the principle as enunciated in *Warren v. Warren* applies.

(4) The rule does not preclude a spouse from giving evidence of non-access previous to marriage, even though the result be the bastardizing of the issue. In the *Poulett Peerage Case,* in which a child had been born to the wife six months after the marriage, the Early of Halsbury, L.C., admitted depositions by the husband to the effect that he had not had pre-marital intercourse. A distinction is drawn between proving non-access before marriage, and proving non-access during marriage.

(5) The question of the applicability of the rule in *Russell v. Russell* to proceedings of filiation under the various Provincial Acts, such as the Nova Scotia Illegitimate Children's Act, has arisen. However, in view of the fact that the matter involves merely an interpretation of the different legislative enactments, it will suffice to cite some of the cases: *Re Brown and*

Argue (34); *Town of Hantsport* x. ***Pulsifer*** (35); *Dodd v. Wilcox* (36); *Thomas v. Ryan* (37).

(6) Lastly, we shall direct our attention to nullity suits and consider the case of *Farnham v. Farnham* (38). There, a husband was petitioning for the nullification of his marriage on the grounds of his wife's impotency. The incapacity, however, was not general, in that the respondent was *frigida ad hunc* in regard to the petitioner, and some two years after the parties had separated the respondent gave birth to a child. The question therefore arose whether direct evidence of the nonconsummation of the marriage by the petitioner would offend against the Russell rule, as such evidence would have the effect of bastardizing the child. Mr. Justice Langton, in the Probate Division, in coming to his decision, believed that he was not assisted by the judgments in *Russell v. Russell,* for although the Lords Justice averred that the rule did not extend and apply to nullity suits, they did so on the supposition that in such cases the critical problem of illegitimacy could not arise. At page 718 Viscount Finlay stated that nullity suits

> " . . . have no relevance to the present question. In them there is no question of paternity, or of bastardizing issue."

And at pages 728 and 729 Lord Dunedin with emphasis commits himself thus:

> "No proof of conduct or want of conduct which shows nullity . . . has the remotest reference to the point of legitimacy of issue."

Consequently, Langdon, J., concluding that there was no direct authority on the subject, held the petitioner's testimony admissible, arguing that if exceptions to the Russell rule were to be permitted, that this case would surely *a fortiori* follow from the exception allowed in the Poulett Peerage case. This appears truly to be an exception, for there is no doubt that the effect of the husband establishing the fact of the impossibility of his intercourse with his wife is to make the child illegitimate. It is distinguishable from the Russell case in this, that whereas in divorce cases a deliberate attempt is made, by showing non-access, to *prove,* let us repeat, to *prove* illegitimacy, in nullity suits the illegitimacy follows as an incidental and irrelevant

(34) 1925 3 D.L.R. 873.
(35) 1933 4 D.L.R. 518.
(36) 1936 1 W.W.R. 98.
(37) 1937 4 D.L.R. 729.
(38) 1936 3 A.E. 776.

consequence of proof of impotency, which is the only question in issue. In the first case, the birth of an illegitimate child is relied on as proving adultery, in the second case the birth of an illegitimate child is a mere accidental fact, on which there is no reliance, but which follows, as it were, inadvertently from proof of non-access. However, the basis for this distinction would seem to be undermined in defended cases in which the fact of the birth of a child is set up to disprove impotency. In such a state of affairs it is difficult to see that legitimacy is not just as much an issue as it it in cases of divorce.

This brief treatise pretends neither to be exhaustive nor conclusive, but, with candor, we believe that it represents, within its scope, a true picture of the law down to the decision of the Court of Appeal in *Ettenfield v. Ettenfield*. This latter case reinstates the Russell rule in its widest possible application, and resuscitates it intact from the deadly assaults of the Divorce Court. In cases such as those in which the spouses are, for example, separated for periods of years by the vast expanse of oceans, the rule would appear to work unnecessary hardship, and by virtue of this it is likely that it will ever tend to encourage attempts at the mitigation of its rigors. Lord Justice Goddard, as we have seen, has frustrated some of those attempts, and consequently, for the time being, the law is and shall be as he has laid it down. Leave, however, has been granted to take the Ettenfield case, on appeal, to the House of Lords, in which event, the whole matter will be subjected to a searching scrutiny. For the final outcome we can only wait.

ALEX SMITH.

It has seemed to me that Russell v. Russell was, and was generally regarded as, an unfortunate decision. Mr. Smith's history of the long series of encroachments upon it is sufficient evidence that the English courts have regarded it in the same light. It is regrettable that their "error" has been exposed by Ettingfield v. Ettingfield.

That the House of Lords in Russell v Russell should have been offended by the obscene details of the evidence there offered is understandable, but there never was any need to lay down a principle of exclusion in language so broad as to exclude all testimony by the spouses, whether obscene or not.

M. M. M.

BOOK REVIEW

I.—*Evoluçao do Controle Jurisdicional da Constitucionalidade das Leis Nos Estados Unidos.*—By George H. Jaffin.

II.—*A Evoluçao do Controle da Constitucionalidade das Leis No Brasil.*—By Cândido Mota Filho.

Imprensa Nacional, Rio de Janeiro, 1941.

I.

This is a translation into Portuguese of the Spanish text earlier reviewed (see 4 Alta. Law Quarterly 60). I have nothing to add to what was then said except that I feel less confidence in my dissent from the author's advocacy of a wider use of declaratory judgments in constitutional cases, but the problem demands more research than I have opportunity to give. I am asking Mr. Jaffin to supply the Quarterly with an English text of this study in order that we may reprint it.

II.

Professor Mota's study briefly but clearly traces Brazilian constitutional history from 1891 to 1937. In it no decisions are discussed and the changes recorded are constitutional amendments which gradually depart from the original model, the Constitution of the United States of America. Professor Mota's emphasis is not, as is Mr. Jaffin's, on the procedural devices by means of which a court becomes seized of the question of the legal validity of legislation, but is rather on the area and propriety of judicial control.

Throughout his study he insists on the difference in historical and political background between the United States of America and the United States of Brazil. Apparently there has been dissatisfaction with the process of judicial review in Brazil in cases in which political feeling ran high. Perhaps a long tradition is essential to the complete absorption of that unique compound of parliamentary sovereignty and judicial supremacy securing individual liberty through limitations on governmental powers which American legal institutions have developed by superimposing upon British and colonial history a strong element of Natural Law legal philosophy.

Brazil apparently has not yet attained this ideal. Indeed the constitution of 1937 makes a direct break with American tradition by instituting parliamentary review of judicial review of parliamentary activity. Article 96 of the Constitution of that year provides as follows:

> "No caso de ser declarada a inconstitucionalidade de uma lei, que a juízo do Presidente da República seja necessária ao bem estar do povo, à promoçao ou defesa de interêsse nacional de alta monta, poderá o Presidente da República submetê-la, novamente, ao exame do Parlamento; se êste confirmar, por dois terços de votos, em cada uma das Câmaras, ficará sem efeito a decisao do Tribunal."

This means that judicial control will be effective only when the administration of the day cannot muster a two-thirds majority in both houses, or decides to let the matter stand where the court left it. This does not deprive the Federal Supreme Court of all effectiveness as a check on political tyranny. Its power is nevertheless less than that of American courts.

Professor Mota claims, and in one sense he is right, that Article 96 of the Brazilian Constitution is more democratic than the American doctrine of judicial supremacy. Long ago Aristotle who, though often absurdly wrong in scientific matters, possessed a good deal of political wisdom, pointed out the danger to democracy itself of the attempt to make it too complete. That path leads to demagogery and dictatorship, and that is the danger of Article 96. Probably no two people who esteem democracy see in it the same thing, and this is no place for an extended discussion. But to me its chief value lies in that under it each individual life has certain guaranteed basic freedoms which cannot be invaded through the overpowering force of the political organization. For that reason I believe that the American Constitution more safely serves democracy than section 96 of the new Brazilian Constitution.

The American doctrine of judicial supremacy is man's highest political achievement to date, despite the fact that on many occasions its exercise has been characterized by a complete lack of wisdom. Generally speaking, a reflective man backed by a life-long study of the law is a much safer guardian of desirable human rights than any chief executive or those controlled by or controlling him, and desirable social change though sometimes delayed is not usually delayed long, only long enough for a portion of the conservative element to understand that it is desirable. It can then be translated into actuality with less force and disruption.

Why cannot we have a more particularized constitutional set-up? Problems of local autonomy versus central authority seem to me to require one set of standards, group and individual interests of substance another,

and individual interests of personality still another. It seems that the time is ripe for a constitutional theory and practice which will permit impending social changes to run their courses without undue sacrifice of individual human values. Within some such scheme article 96 of the Brazilian Constitution of 1937 offers valuable possibilities. Some constitutional amendments should be relatively easy to bring about—others relatively hard. There is a need for careful analysis to prepare the way for a generally accepted graduated scale of obstacles to constitutional change which will achieve flexibility without sacrificing stability.

Latin American languages and Latin American law have received very little attention in this country. These studies, which have reached the Quarterly through the kindness of Mr. Jaffin, make us more conscious of our ignorance but anxious to learn. Canadian lawyers should study other legal systems if only to see their own in better perspective. Possibly a wider knowledge of the various federalisms functioning in this hemisphere might assist humanity to organize itself into a federal society. It is as yet too soon for the world to see that its future welfare or chaos depends upon whether or not it adopts some form of federalism in place of the anarchy inseparable from separate national sovereignties. But the time of its successful adoption will be advanced by careful comparative studies of the actual workings of systems now in operation. For anyone not already overburdened here is a fruitful field for endeavor.

M. M. MacIntyre.

THE LAW SOCIETY OF ALBERTA

SUMMARY

OF THE MINUTES OF THE SEVENTY-SEVENTH MEETING OF THE LAW SOCIETY OF ALBERTA, IN CONVOCATION ASSEMBLED, AT THE MACDONALD HOTEL, EDMONTON, ALBERTA, ON FRIDAY, THE 9th DAY OF JANUARY, A.D. 1942.

ORGANIZATION:

President—W. S. Gray, K.C., Edmonton.
Vice-President—G. H. Steer, K.C., Edmonton.

COMMITTEES:

(The first named in each case to be Chairman.)

Finance Committee—Messrs. J. E. A. Macleod, K.C.; H. S. Patterson, K.C.; C. C. McLaurin, K.C.; J. N. Ritchie, K.C.; W. A. Begg, K.C.; W. E. Payne, K.C.

Library Committee—Messrs. C. C. McLaurin, K.C.; W. H. Odell, K.C.; J. N. Ritchie, K.C.; V. R. Baldwin, K.C.; S. H. McCuaig, K.C.

Education Committee—Messrs. L. Y. Cairns, K.C.; G. H. Steer, K.C.; S. H. McCuaig, K.C.; S. W. Field, K.C.

Legislation Committee—Messrs. S. W. Field, K.C.; G. H. Steer, K.C.; V. R. Baldwin, K.C.; L. Y. Cairns, K.C.; H. S. Patterson, K.C.; W. E. Payne, K.C.

Reporting and Printing Committee—Messrs. H. S. Patterson, K.C.; W. H. Odell, K.C.

Unauthorized Practice Committee—Messrs. W. A. Begg, K.C.; V. R. Baldwin, K.C.; C. C. McLaurin, K.C.

Discipline Committee—Mr. S. H. McCuaig, K.C., and all the Benchers.

Representative of the Society on the Executive of the Conference of Governing Bodies of the Legal Profession in Canada—Mr. S. W. Field, K.C.

Representatives of the Society on the Council of the Canadian Bar Association—Messrs. W. E. Payne, K.C.; G. H. Steer, K.C.; C. C. McLaurin, K.C.

Representative on Senate of University—Mr. S. H. McCuaig, K.C.

DISCIPLINE:

The Benchers considered three complaints against Barristers and Solicitors, one of which had been adjourned from Midsummer Convocation and two of which had been investigated by Investigating Committees during the last half of the year.

The Benchers found one Barrister and Solicitor guilty of conduct unbecoming a Barrister and Solicitor and thereafter adjourned consideration of the question of punishment to next regular Convocation. The Benchers found one Barrister and Solicitor guilty of conduct unbecoming a Barrister and Solicitor and ordered that he be reprimanded. The Benchers referred a complaint against one Barrister and Solicitor back to the Investigating Committee for further investigation.

The Benchers decided to ask the Department of the Attorney-General to cancel the commission as Notary Public of any Barrister and Solicitor whose name has been, or may be hereafter struck from the Roll of the Society.

REPORT OF SECRETARY:

The report of the Secretary for the period from the 15th of June, 1941, to December 31st, 1941, contained the following information:

Students-at-Law admitted during the period	5
Students-at-Law enrolled during the period	4
Number transferred to non-practicing list	3
Number on Roll	1,252
Number on active practicing list to whom Annual Practicing Certificates for 1941 had been issued	451
Number on active practicing list who have enlisted for military service in addition to the number previously reported	15

DEATHS:

Joseph A. Clarke, K.C., of Edmonton, July 27th, 1941.

Harry A. White, Mundare, October 18th, 1941.
Ex-Judge W. A. D. Lees, Wetaskiwin, November 10th, 1941.
Pilot Officer James Robinson, of Jasper, November 10th, 1941. (Killed in flying accident.)

The Benchers unanimously passed a resolution regretting the deaths of the above members of the Society and expressing the sympathy of Convocation with their families.

REPORT OF TREASURER:

STATEMENT OF RECEIPTS AND PAYMENTS FOR THE PERIOD ENDED 31st DECEMBER, 1941
GENERAL FUND

Receipts:

Admission fees of barristers	$ 750.00
Annual fees and reinstatements	6.00
Enrolment fees of students	220.00
Assignment of articles	10.00
Special petitions	10.00
Special certificates	8.00
Interest on bonds	465.35
	$ 1,469.35
Annual fees received on 1942 account	730.00
Transfer from Relief Fund	1,097.50
Sale of Dominion of Canada Victory Loan bonds—$2,000	1,995.00
Bank balance 15th June, 1941	1,876.15
	$ 7,168.00

Payments:

Salaries:		
Secretary and solicitor	$1,500.00	
Auditors	75.00	
Librarians	505.00	
		$ 2,080.00
General expense:		
Exchange and interest	$ 27.03	
Printing and stationery	216.15	
Postage and sundries	216.43	
Library expenses	21.33	
Treasurer's bond	40.00	
		520.94

Convocation expenses		510.50
Canada Law Reports		510.00
Discipline Committee costs and expenses		342.62
Expenses re McCaffry vs. Law Society		399.18
Expenses re election of Benchers		69.21
		$ 4,432.45
Books purchased for libraries:		
Calgary	$ 582.38	
Red Deer	190.09	
Wetaskiwin	185.69	
Edmonton	689.05	
Grande Prairie	133.24	
Macleod	192.88	
Lethbridge	274.42	
Medicine Hat	244.42	
Vegreville	243.38	
		2,735.55
		$ 7,168.00

RELIEF FUND

Receipts:

Bank balance 15th June, 1941		$ 1,568.34
Interest on Knox Church mortgage	$ 200.00	
Interest on bonds	17.00	
Instalment received on agreement of sale of Red Deer property	300.00	
		517.00
		$ 2,085.34

Payments:

Grants for relief		$ 255.00
Transferred to General Fund		1,097.50
Bank balance 31st December, 1941:		
Capital account	$ 721.04	
Revenue account	11.80	
		732.84
		$ 2,085.34

ASSURANCE FUND

Receipts:

Bank balance 15th June, 1941		$ 1,552.34
Levy for 1941	$3,375.00	
Interest on bank savings account	15.06	
Interest on bonds	126.75	
		3,516.81
		$ 5,069.15

Payments:

Purchase of Dominion of Canada Victory Loan Bonds, $2,000, 3%, 1951	$ 1,995.00
Bank balance (savings account) 31st December, 1941	3,074.15
	$ 5,069.15

STATEMENT OF RECEIPTS AND PAYMENTS FOR THE YEAR ENDED 31st DECEMBER, 1941
GENERAL FUND

Receipts:

Admission fees of barristers	$ 1,200.00
Annual fees and reinstatements	7,311.00
Enrolment fees of students	770.00
Assignment of articles	15.00
Fees on special petitions	20.00
Special certificates	14.00
Interest on bonds	932.56
Refund on loan to returned barrister	140.19
Recovery of damages to Red Deer property, 1930	74.93
	$10,477.68
Examination fees	45.00
Annual fees received on 1942 account	730.00
Sale of Dominion of Canada Victory Loan bonds, $2,000	1,995.00
Transfer from Relief Fund	1,097.50
	$14,345.18
Bank balance 1st January, 1941	2,620.18
	$16,965.36

Payments:

Salaries:		
Secretary and solicitor	$3,000.00	
Auditors	150.00	
Librarians	940.00	
		$ 4,090.00
General expense:		
Exchange and interest	$ 49.79	
Printing and stationery	335.12	
Postage and sundries	425.28	
Treasurer's bond	40.00	
Library expenses	57.77	
		907.96
Convocation expenses		835.85
Canada Law Reports		1,040.00
Discipline Committee costs and expenses		844.41
Insurance on libraries for three years		852.43
Expenses re McCaffry vs. Law Society		742.83
Expenses re election of Benchers		69.21
		$ 9,382.69
Examination fees		45.00
Books purchased for libraries:		
Calgary	$1,284.25	
Red Deer	337.30	
Wetaskiwin	328.30	
Edmonton	1,446.26	
Grande Prairie	230.78	
Macleod	376.71	
Lethbridge	569.30	
Medicine Hat	415.00	
Vegreville	299.77	
	$5,287.67	
Vegreville—final instalment on original purchase	250.00	
		5,537.67
Purchase of Dominion of Canada Victory Loan bonds—$2,000, 3%, 1951		2,000.00
		$16,965.36

RELIEF FUND

Receipts:

Bank balance 1st January, 1941		$ 1,391.34
Interest on Knox Church mortgage		400.00
Interest on bond		34.00
Instalments received on agreement of sale of Red Deer property (of which $146.73 credited on interest)		600.00
		$ 2,425.34

Payments:

Grants for relief		$ 595.00
Transferred to General Fund		1,097.50
Bank balance 31st December, 1941:		
Capital Account	$ 721.04	
Revenue Account	11.80	
		732.84
		$2,425.34

ASSURANCE FUND

Receipts:

Bank balance 1st January, 1941	$ 1,444.59
Levy for 1941—450 members	3,375.00
Interest on bank savings account	26.06
Interest on bonds	223.50
	$ 5,069.15

Payments:

Purchase of Dominion of Canada Victory Loan bonds—$2,000, 3%, 1951	$ 1,995.00
Bank balance (Savings account) 31st December, 1941	3,074.15
	$ 5,069.15

BALANCE SHEET—31st DECEMBER, 1941

GENERAL FUND

Assets:

Libraries:		
Valuation as at 31st December, 1940		$115,726.79
Amounts paid during the year ended 31st December, 1941		5,287.67
		$121,014.46
Less amount reserved for depreciation		4,738.55
		$116,275.91

Divided as follows:		
Calgary	$32,510.08	
Red Deer	6,695.28	
Wetaskiwin	7,263.31	
Edmonton	32,986.66	
Grande Prairie	2,444.80	
Macleod	10,068.56	
Lethbridge	13,686.16	
Medicine Hat	9,571.79	
Vegreville	1,049.27	
		$116,275.91
Furniture, cost $761.80 (at nominal value of)		1.00
Law Libraries, English reprints		740.88
Investments:		
Province of Alberta 4½% bonds ($4,100 par)	$3,904.62	
Province of Alberta 4% bonds ($2,000 par)	1,936.82	
Province of British Columbia 4½% bonds (P.G.E. Railway, $1,000 par)	995.16	
City of Calgary 4½% bonds £2,100 par)	9,509.43	
City of Edmonton 4½%/5% bonds ($5,000 par)	4,319.28	
Calgary School District 5% bonds ($500 par)	439.20	
Dominion of Canada Second War Loan bonds 3%, 1952 ($1,000 par)	988.81	
		22,093.32
(Market value of bonds about $19,464)		
Accrued interest on bonds		396.34
Unexpired insurance		568.29
Petty cash in hands of Chief Librarian		7.74
Due from Assurance Fund		20.00
		$140,103.48

Liabilities:

Annual fees received on 1942 account	$ 730.00
Canada Law Reports	478.00
Due to Relief Fund	1,097.50
Surplus	137,797.98
	$140,103.48

RELIEF FUND

Capital Account

Assets:

Province of Alberta bond 4%, 1957 ($500 par)	$ 484.22	
Dominion of Canada Second War Loan bonds, 3%, 1952 ($800 par)	791.01	
		$ 1,275.23
(Market value of bonds, $1,071)		
Loan on mortgage—Knox Church, Calgary		8,000.00
Agreement of sale of Red Deer property		2,446.73
Balance at bank—31st December, 1941		721.04
		$12,443.00

Liabilities:

Nil.

Surplus	$12,443.00

Revenue Account

Assets:

Interest on Knox Church mortgage, due 1st January, 1942	$ 200.00
Accrued interest on bonds	6.83
Accrued interest on agreement of sale	75.74
Due from General Fund	1,097.50
Balance at bank—31st December, 1941	11.80
	$ 1,391.87

Liabilities:

Nil.

Surplus	$ 1,391.87

ASSURANCE FUND

Assets:

Bank (Savings account)		$ 3,074.15
Investments:		
Dominion of Canada bonds:		
First War Loan, 3¼%, 1952 ($3,000 par)	$3,000.00	
Second War Loan, 3%, 1952 ($3,200 par)	3,164.13	
Victory Loan, 3%, 1951 ($2,000 par)	1,995.06	
		8,159.19
(Market value of bonds, $8,159.)		
Accrued interest on bonds		64.62
		$11,297.96

Liabilities:

Due to General Fund	$ 20.00
Amount of Fund	11,277.96
	$11,297.96

RECONCILIATION OF GENERAL FUND SURPLUS ACCOUNT FOR THE YEAR ENDED 31st DECEMBER, 1941

Balance 1st January, 1941		$140,274.90
Additions:		
Receipts as per cash statement	$10,477.68	
Adjustments of discounts on bond investments	87.21	
Annual fees for 1941 received in 1940	460.00	
Interest on bonds due from Assurance Fund	20.00	
Increase in unexpired insurance	568.29	
Decrease in liability for Canada Law Reports	39.00	
		11,652.18
		$151,927.08
Deductions:		
Payments as per cash statement	$ 9,382.69	
Depreciation of libraries	4,738.55	
Decrease in balance in hands of Chief Librarian	2.86	
Loss on sale of bonds	5.00	
		14,129.10
		$137,797.98

REPORT OF AUDITOR:

The Auditor's Report contained the following certificate:

"We report that we have obtained all the information and explanations which we have required and that in our opinion the attached Balance Sheets dated 31st December, 1941, have been properly drawn up so as to exhibit a true and correct view of the state of the Society's affairs, according to the best of our information and the explanations given to us and as shown by the books of the Society.

WILLIAMS & WILLIAMS,
Chartered Accountants,
Auditors of the Law Society of Alberta."

REPORT OF SOLICITOR:

The Solicitor reported that during the half year he had appeared for the Society on the investigation of complaints against two solicitors.

DISCIPLINE COMMITTEE:

The report of the Chairman dealt with twenty-six complaints which in his opinion did not justify further investigation.

COMMITTEE ON UNAUTHORIZED PRACTICE:

The report of the Chairman dealt with three complaints in which no action had been taken and three complaints which were still under investigation.

PETITIONS:

The Benchers considered and granted the Petition of John J. Stewart, Student-at-Law. The Benchers adjourned consideration of the Petition of Morris Shumiatcher, Student-at-Law, to Midsummer 1942 Convocation.

RE REVISION OF THE RULES OF COURT:

The Legislation Committee reported that a Committee had been named to revise the Rules of Court. The Committee is composed of the Honourable Mr. Justice Ewing, the Honourable Mr. Justice O'Connor, Mr. E. P. McNeill, K.C., Calgary, Mr. S. W. Field, K.C., Edmonton, and Mr. H. S. Hurlburt, Vegreville, with Mr. F. J. Newson, Edmonton, as Secretary.

RE GARNISHMENT OF SALARIES OF DOMINION CIVIL SERVANTS:

The Legislation Committee reported on correspondence with the Department of Justice following the resolution of the Medicine Hat Bar Association asking that legislation be enacted by the Parliament of Canada corresponding to the Civil Service Salary Garnishment Act of Alberta (R.S.A. 1922, Chapter 93) with provision that same should apply to all persons employed by any Department of the Civil Service of Canada. Convocation instructed that the submission of Mr. W. A. Begg, K.C., be forwarded to the Minister of Justice.

RE INCREASE IN FEES IN PROBATE MATTERS:

The Legislation Committee reported that this matter was under consideration and it had been taken up with the Department of the Attorney

General. The Committee was empowered to make definite suggestions to the Department of the Attorney General based on suggestions received by it from the different Bar Associations.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE LAW SOCIETY OF ALBERTA:

Rule 45.—Rule 45 was amended by adding at the end of the said Rule the words "in the General Fund".

Rule 54.—Rule 54 was amended by adding as 54 subsection (1) the following words:

> "The Chairman of the Discipline Committee when naming an investigating Committee under this Rule shall designate one of the persons named as member thereof as Chairman of the Investigating Committee and the Chairman so designated may from time to time adjourn any hearing of any complaint to such other time or place as he may decide without the necessity for the Committee's meeting together to make such adjournment or adjournments."

Rule 120.—Rule 120 was amended by adding following the word "Alberta" at the end of line 6 thereof, the following words "and on enrollment as a student-at-law of a practitioner from any foreign country".

RE EDUCATION:

The Benchers referred the matter of endeavouring to arrange a method whereby prospective students-at-law should be examined as to their fitness to undertake the course in law at the University of Alberta to the Education Committee for consideration and report.

MEETING OF MEMBERS OF THE LAW SOCIETY OF ALBERTA:

The Benchers appointed a special committee consisting of Messrs. Cairns (Chairman), Steer, Payne, Macleod and Ritchie to canvass the situation for the purpose of ascertaining whether the members of the Bar in Alberta, as a whole, desired that an Annual Meeting should be held in 1942.

Power was given to the President, if it seems advisable to do so, to call a meeting in June or July, 1942. The Benchers decided owing to war conditions that no contribution would be made by the Society toward the cost of entertainment if a meeting is held and further decided that in the

event of a meeting being held it should be of a business nature only without any dinners or other functions.

RE RENT OF PREMISES USED IN CONNECTION WITH THE BUSINESS OF THE SOCIETY:

The Benchers decided to pay from and after the first day of January, 1942, monthly to the Secretary-Treasurer the sum of $50.00 per month toward rent of the office used in connection with the business of the Society.

RE NEXT MEETING:

The next regular meeting of the Benchers was set for Friday, the 3rd day of July, 1942, commencing at ten a.m., at the Palliser Hotel, Calgary.

The following Benchers were in attendance:

Messrs. W. S. Gray, K.C., President,
G. H. Steer, K.C., Vice-President,
W. E. Payne, K.C.,
W. A. Begg, K.C.,
W. H. Odell, K.C.,
V. R. Baldwin, K.C.,
S. W. Field, K.C.,
J. E. A. Macleod, K.C.,
H. S. Patterson, K.C.,
J. N. Ritchie, K.C.,
L. Y. Cairns, K.C.,
S. H. McCuaig, K.C.,
C. C. McLaurin, K.C.

"W. S. Gray," *President.*
"E. W. S. Kane," *Secretary.*

IMPORTANT NOTICE

At the request of the Foreign Exchange Control Board the following memorandum is called to the attention of the members of the Bar:

"It has come to the notice of the Foreign Exchange Control Board that Canadian solicitors have sent cheques to non-resident beneficiaries of estates and to non-resident clients without complying with the requirements of the Foreign Exchange Control Order.

"The Board calls attention to Section 22 (2) and (3) of the Order, which reads as follows:

> **Section 22 (2): No resident shall, without a permit from the Board, pay or transfer any Canadian dollars or any right, title or interest in or to any Canadian dollars to a non-resident or to the account or for the credit of a non-resident.**
>
> **(3): For greater certainty but not so as to restrict the generality of the foregoing provisions of this section, it is hereby declared to be a transfer of Canadian dollars to draw, make, issue or endorse any cheque, draft, money order, postal order, letter of credit, bill of exchange or other similar instrument payable in Canadian dollars.**

"Delays and misunderstandings invariably ensue when these cheques, bearing no evidence that the required permit has been secured, are presented for payment in Canada. The Board requests that all solicitors, before attempting to make any Canadian dollar payment to a non-resident, ascertain from an Authorized Dealer of the Board (i.e. a branch of a Canadian bank) the necessary procedure to be followed."

EDWARD THURLOW, LORD THURLOW, 1732-1806

Lord Chancellor Thurlow has been as much praised and as much abused as any man who ever held the Great Seal, and for his different qualities equally deserved both the approbation and censure which he received. To a coarseness, partly natural and partly assumed, to a presumptuous haughtiness of demeanour, to a pretended disregard for the opinion of mankind, and to a gross looseness of morals, were added the qualities of great talent, great courage and determination and a natural good nature and kindness of heart.

Lord Thurlow was born in 1732, the second son of Reverend Thomas Thurlow, rector of Ashfield in Suffolk. From early childhood he showed an unconquerable spirit and overbearing disposition which he displayed at home and later carried to school with him. However, he did not at any time neglect to study. He was educated at Scarning School, King's School at Canterbury and finally entered Cains College, Cambridge, in 1748 where he studied until 1751 when his insolence and insubordination brought about his gentle expulsion.

Soon after leaving university he entered the Inner Temple to study law. He was called to the bar in 1754 and, after the comparatively short term of seven years practice he was made a King's Counsel.

Together with his career as a lawyer Lord Thurlow entered upon an active political career which was such a major factor in his success that he is constantly referred to as a "political chancellor." He was elected to parliament for the borough of Tamworth in 1768. In 1770 he was made Solicitor General in Lord North's ministry, and in 1771 became Attorney-General, which position he retained till he was raised to the peerage in 1774. In the House of Commons he was one of the most powerful and efficient supporters of Lord North's administration.

In 1778 he succeeded Lord Bathurst as Lord Chancellor which position he retained until 1790 with the exception of a short interval of seven months during which it was put into commission. In the House of Lords he maintained the same energy and effrontery that he had shown in the House of Commons. On the termination of Lord North's administration he retained the seal of office despite great opposition. This was principally due to the high regard and favour with which he was held by King George III in whose presence alone he dropped his overbearing demeanour.

He was very much respected by the King and remained in his very close confidence.

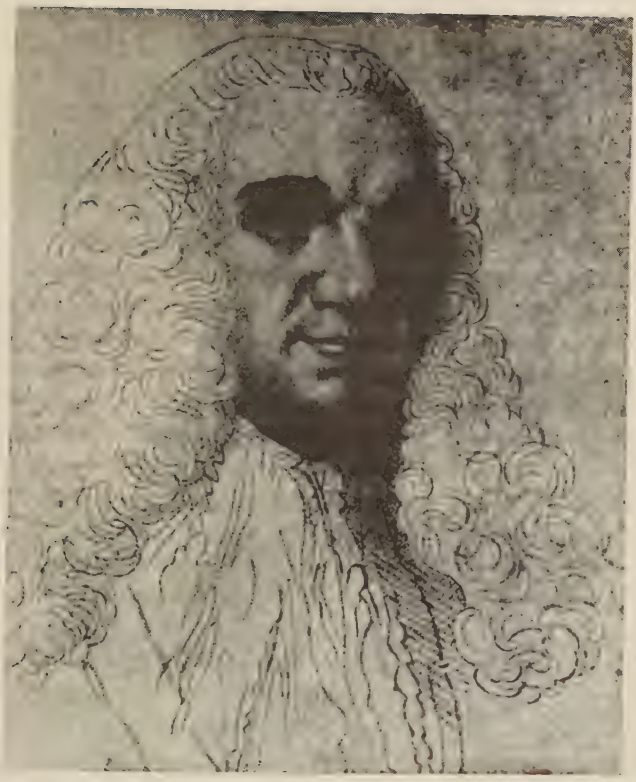
In 1783 he again became Chancellor under Mr. Pitt's newly formed ministry. Differences arose between the premier and the Lord Chancellor. Both rivalled one another for retention of the King's confidence. Lord Thurlow soon began to exert his influence with the King in opposition to the government. 1790 Mr. Pitt was forced to demand his dismissal.

He remained a member of the House of Lords until his death in 1806, and was granted a patent of peerage with remainders over on his death. He never married, leaving as his only issue three illegitimate daughters, and his title descended to his nephew.

Thurlow possessed great natural abilities and a considerable knowledge of law, though he is not regarded as among the greatest Lord Chancellors. He was primarily a "political chancellor" and his success was largely due to clever political intrigue. The effect of his speeches in parliament and in court was greatly enhanced by his authoritative bearing and fearsome aspect. Mr. Fox, whose India Bill Lord Thurlow vigorously opposed in the House of Lords, described his countenance as making him "look more wise than any man ever was." Beneath this rough, overbearing appearance and manner lay a kindness of heart, evidenced by his liberal gifts to churches and charity, and his generous support to many men of art and literature.

Thurlow's fame as Lord Chancellor is overshadowed by his political career, and in that he is better known for his courage and self-confidence than for his wisdom. Always a strenuous advocate for the retention of privilege and power he asserted the right of England to tax the colonies, opposed freedom of the press, trial by jury, abolition of slavery and all attempts at economic reform.

F. E. LaBrie.



Edward Thurlow, Lord Thurlow, 1732-1806

LAW PRACTISE IN THE TERRITORIES

The pioneer phase of settlement in the Northwest Territories is passing. To date, development can be attributed to fur and gold. But the potential resources of the country are undetermined. Game and fish abound. Agriculture has proved successful in many parts. There is oil. There may be coal, tin and other valuable minerals, in quantity. Hydro-electric projects have been proved practicable. The transportation problem, although difficult, is not insurmountable.

Recently, the area has been mentioned as a potential place of settlement for homeless war victims. Regardless of that possibility, the refreshing sense of freedom and adventure to be found in a new country, often connoted in this instance by the expression "the lure of the North," will continue to attract more and more settlers.

Timely consideration of both the administrative and the substantive law of the new communities might avoid many weaknesses apparent in more mature legal systems.

The expression "practising law" acquires a rather broad meaning within the Territories. The majority of laymen appear to consider the ordinary functions of the lawyer to comprise any form of office work. Also, the very sketchy legal system, operative at the present time, places definite limitations on the practice of law, making it an economic necessity for the lawyer to undertake unusual duties. Advising regarding business and domestic relations, setting up bookkeeping systems and personal budget plans, filing Income Tax Returns, filing the various forms required under the Quartz Mining Regulations (1), arranging personal loans and extensions of credit, even writing letters "home", are routine matters. In respect to the community as a whole, perplexing problems of administrative law must be met. At the present time, the Northwest Territories is in the unique position of being without any representation in the Parliament of the Dominion. Yet, the inhabitants, white and native alike, are governed directly by that body and taxed accordingly.

With respect to legislation affecting the area, a difficult reconciliation must be made between what has been done in the past and what should be done in the future. Practical administration of almost (2) the entire

(1) Regulations for the Disposal of Quartz Mining Claims on Dominion Lands in the Northwest Territories, O.C. Mar. 4, 1932, 1932 P.C. 507. Effective 2nd April, 1932.

(2) See R.S.C. 1927, Chap. 142, s. 2(k).

north country north of the sixtieth parallel (with the exception of the Yukon Territory), is delegated to a Council consisting of the Commissioner of the Northwest Territories and six assistants, one of whom is appointed Deputy Commissioner and "may perform and exercise all the functions and powers" conferred on the Commissioner by the *Northwest Territories Act* (3). The Council derives all of its powers under and by virtue of this Act. In general, the powers conferred on the Council are similar to those conferred on the provincial legislatures under section 92 of the *British North America Act* 1867. In the *Northwest Territories Act* itself the Dominion Government enacted legislation on subject matters ordinarily within the scope of the provincial legislatures, as for example, lunatics, married women's property rights, wills, coroners and inquests. However, a fundamental difference is seen in the wording of section 10 of the *Act* which lists certain classes of subjects in relation to which the Commissioner in Council may make ordinances as the same are from time to time designated by the Governor in Council. The section following provides that with regard to the subjects which shall be so designated the Commissioner in Council shall have no greater powers than the provincial legislatures have with regard to similar subjects mentioned in section 92 of the *British North America Act*.

The parent Act of the Northwest Territories (4) did establish for the area it defined a set-up which corresponded to the present day provincial administrations. That is, it provided for a Lieutenant Governor, an elected Legislative Assembly and an Executive Council chosen from the latter. After the Provinces of Alberta, Saskatchewan and Manitoba had been formed "Commissioner" was substituted for "Lieutenant Governor" and the present "Council" for the former "Executive Council". In other words, an entirely new administrative body was simply fitted into the existing legislation and automatically assumed the powers of the former incumbent.

The Commissioner, by and with the consent of the Council, may make ordinances on subjects within the scope of the Council's authority for the government of the Territories. Such ordinances are laid before both Houses of Parliament and may be disallowed by the Governor in Council at any time within two years after their passage. It is apparent therefore

(3) R.S.C. 1927, Chap. 142.
(4) *The North-West Territories Act*, R.S.C. 1886, c. 50.

that the Commissioner is a chief executive officer with very real and substantial powers. Neither the Commissioner himself, nor any of the Council members, is required to be resident in the Territories, and as a matter of fact at the present time none of them is. All are appointed by the Governor in Council "from time to time". Actually there are no statutory qualifications for appointment set out in the *Act* (5).

Obviously, the powers of this Council are extensive. It is significant that it is rarely referred to by its correct legal designation, but simply as "Ottawa", or "The Department". (For purposes of administration, the Council operates under the Department of Mines and Resources.)

The laws applicable in the Northwest Territories are outlined as follows:

(1) The laws of England relating to civil and criminal matters as the same existed on July 15th, 1870, "in so far as the same are applicable to the Territories and in so far as the same have not been, or are not hereafter, as regards the Territories, repealed, altered, varied, modified, or affected by any Act of the Parliament of Great Britain or of the Parliament of Canada, applicable to the Territories, or by any ordinance of the Territories" (6).

(2) Laws and ordinances in force in the Territories and not inconsistent with the Northwest Territories Act as cited herein, or repealed in the revision of the Statutes of Canada authorized in 1924, unless it has been or shall be otherwise provided or ordered by Dominion legislation or the Governor in Council or by the Commissioner in Council (7).

(3) Acts of the Parliament of Canada if not otherwise specifically provided, if not applicable specifically to one or more of the provinces only, and if not for any reason inapplicable to the Territories. The Governor in Council may by proclamation extend the application of any Dominion legislation or part or parts thereof to the Territories (8).

(4) Ordinances passed by the Commissioner in Council.

On the subject of administration, attention is called to *The Local Administrative Districts Ordinance*. However, it is unnecessary to discuss local administrative bodies which may be constituted under this Ordinance

(5) See R.S.C. 1927, Chap. 142, ss. 3 and 8.
(6) R.S.C. 1927, Chap. 142, s. 14.
(7) R.S.C. 1927, Chap. 142, s. 15.
(8) R.S.C. 1927, Chap. 142, ss. 16 and 17.

since their powers are delegated from the Commissioner in Council and they are answerable directly to that body.

The cumulative result of the operation of this set-up is a confused mass of legislation for the most part inapplicable to present conditions. For it must be remembered that the parent *North-West Territories Act* (*supra*) was passed in 1886. Amendments over a period of fifty-five years have changed both the actual area affected and the administrative machinery. Nevertheless, most of the laws and ordinances so enacted are still in force. The ordinances which have been made with the present defined area in mind, or in other words since 1905, remind one in some measure of a jigsaw puzzle with pieces placed here and there as a need has arisen or a demand been made; but with many blank spaces, and as yet no suggestion of the completed pattern. To fill in the gaps, where there is no applicable Dominion legislation, it is necessary to refer back to the laws of England as they existed in 1870, together with recent judicial developments, and the conclusions so arrived at are always open to the argument that "the same are not applicable to the Territories".

Where a need for new or improved legislation arises the Council must of necessity be informed and persuaded. It is difficult to present a problem successfully in all its aspects and indicating all the various shades of public opinion relative thereto simply by correspondence. Yet, with the Council hundreds of miles distant from the new communities and separated by extremely costly methods of travel, that is practically the only method available. Occasionally a Councillor makes a flying trip through the Territories. But simply an explanation of such requirements particularly to persons who have no first-hand experience of the problems, is not productive of real understanding and competent legislation. Furthermore, such a piecemeal method of handling legislation cannot produce any co-ordinated whole.

Once the lawyer clears the initial hurdle of the two hundred dollar fee required before he can be admitted to practise in the Territories he very soon encounters many more obstacles in his course.

The first, and perhaps most important matter to be considered regarding the administration of justice both civil and criminal is the actual machinery in use. The early history in this respect was clearly and interestingly related by the Honourable Horace Harvey, Chief Justice of Alberta, in 1934 (9).

(9) 1934 1 Alberta Law Quarterly 1.

On June 2, 1886, the Parliament of Canada, by Chapter 25 of that year, made provision for a Supreme Court of the North-West Territories, and that Act came into Force February 18, 1887. This Court consisted of five judges. The Lieutenant Governor in Council was empowered to pass ordinances for procedure in civil matters. Procedure in criminal matters was to follow that in similar cases in England as at July 15th, 1870, with the exception that there was no grand jury. Today, the Criminal Code of Canada provides criminal procedure as well in the Territories as in other parts of the Dominion. With regard to civil procedure, the Lieutenant Governor in Council in 1898 enacted *The Judicature Ordinance* (10), which is still extant. This Ordinance therefore provides the Rules of Court in civil proceedings. In all main headings these Rules are substantially similar to those governing practice in the courts of the provinces. As a matter of fact the main body of these Rules was taken over and re-enacted by the Provinces of Alberta and Saskatchewan upon their formation. So that the Rules in civil procedure were made for a Court of five members and are as elaborate and complex as those in force where such a court exists. The Supreme Court of the North-West Territories was disestablished by section 8 of *The North-West Territories Amendment Act* 1905. In its stead, at the present time there are two resident stipendiary magistrates, one at each of the Settlements of Fort Smith and Yellowknife. In addition, other stipendiary magistrates, appointed in and for the Northwest Territories, reside at various points outside the Territories. Their powers are defined by section 34 (2) of the *Northwest Territories Act* as follows:

> "2. Every stipendiary magistrate so appointed shall have and may exercise the powers, authorities and functions which were vested in a judge of the Supreme Court by the Northwest Territories Act, chapter fifty of the Revised Statutes 1886, on the 31st day of August in the year 1905."

Heretofore, it was taken for granted that a stipendiary magistrate had all the powers of a Supreme Court Judge of one of the provinces. However, a question has arisen as to jurisdiction in matters of divorce. On investigation, the powers vested in a judge of the Supreme Court of the North-West Territories under chapter fifty of the Revised Statutes 1886, prove to be governed by the following sections of that Act:

(10) C.O. 1898, c. 21 amd.

"48. The court shall within the Territories and for the Administration of the laws for the time being in force within the Territories possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction; and shall have, use and exercise all of the rights, incidents and privileges of a court of record and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the 15th day of July, 1870, used, exercised and enjoyed by any of Her Majesty's superior courts of common law or by the court of chancery or by the court of probate in England and shall hold pleas in all manner of actions, causes and suits as well criminal as civil, real, personal and mixed and shall proceed in such actions, causes and suits by such process and course as are provided by law and as tend with justice and despatch to determine the same and shall hear and determine all issues of fact joined in any such action, cause or suit and give judgment thereon and award execution thereon in as full and as ample a manner as might at the said date be done in Her Majesty's court of Queen's bench, common bench or in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods) by the court of exchequer or by the court of chancery or the court of probate in England."

"88. Every judge of the supreme court shall have jurisdiction, power and authority to hold courts whether established by Ordinance of the Legislative Assembly or not, at such times and places as he thinks proper and at such courts as sole judge to hear all claims, disputes and demands whatsoever except as herein provided which are brought before him and to determine any questions arising thereout as well of fact as of law in a summary manner; and such courts shall be open public courts."

The words "except as herein provided" are later explained as a reference to actions where trial by jury was required, special procedure regarding disputed accounts, and actions for the recovery of gambling debts or the price of intoxicating liquor.

It will be noticed that section 48 did not say that the court should have the same jurisdiction as the courts of England but simply that they should possess all the powers and authorities incident to a superior court in England with respect to "the laws for the time being in force within the Territories." Under the *British North America Act* 1867, the Dominion

Government reserved power to legislate in matters concerning divorce. It was not until some time after the formation of Alberta and Saskatchewan that their courts commenced to exercise jurisdiction in divorce. Certain it is that before that time there was some doubt concerning the subject. For in 1894 an Act was passed (11) stating that, "For the removal of doubts it is hereby declared that subject to the provisions of the *North-West Territories Act* the Legislative Assembly has and shall have power to confer on Territorial Courts jurisdiction in matters of alimony". And in 1898 an *Ordinance respecting Alimony* (12) was passed which provided that the Supreme Court of the North-West Territories should have power to grant alimony to a wife who would be entitled to alimony or to a divorce with alimony or to a decree for restitution of conjugal rights under the laws of England. Considering these latter enactments and the absence of any mention of divorce jurisdiction in the Territories, it seems reasonable to conclude that it was taken for granted that such jurisdiction did not exist. However, *The Matrimonial Causes Act*, 1857, formed part of the laws of England as they existed in 1870, and is presently recognized as part of the laws of those provinces of the Dominion which took over the laws of England as they were at that date. In Alberta, divorce jurisdiction was exercised first in the case of *Board v. Board* (13), in Manitoba, in the case of *Walker v. Walker* (14), and in British Columbia, in the case of *Watts v. Watts* (15). There seems to have been and to be no valid reason for excluding the operation of this Act from the Territories either at the time of the Supreme Court of the North-West Territories or at the present date. The conclusion appears reasonable that the judges of the former Supreme Court, either *en banc* or individually, did have divorce jurisdiction. And it follows logically that the present day stipendiary magistrates in and for the Northwest Territories have full jurisdiction in matters of divorce. Nevertheless, owing to the difficulty of establishing the fact of domicile, it may be some time yet before the question actually arises. In the meantime, the legal advisor to the Department of Mines and Resources has ruled that this jurisdiction does not exist.

(11) 57-58 V, c. 17, s. 20.
(12) C.O. 1898, c. 29.
(13) 1919 A.C. 956.
(14) 1919 A.C. 947.
(15) 1908 A.C. 573.

In addition to the stipendiary magistrates so appointed, the Commissioner of the Royal Canadian Mounted Police has the jurisdiction, powers and authority of a stipendiary magistrate while in the Territories (16). Of the two resident stipendiaries, one is a qualified barrister, the other a medical doctor. Of the two non-resident appointees, one is a qualified barrister, the other a mining engineer and geologist.

In criminal matters it is often the case that a stipendiary, who is a duly qualified lawyer, is called upon by the Crown to conduct the prosecution. In that case, it has on occasion turned out that two qualified barristers, acting one on behalf of the Crown, the other on behalf of the accused, have argued a serious criminal case before a stipendiary who had no knowledge whatever of the law or the procedure involved. Considering the cost of a criminal hearing of this nature, such a situation is deplorable.

The resident stipendiary magistrate at the Settlement of Yellowknife is also the Mining Recorder, the Clerk of the Court, the Small Debt Official, the Chairman of the Local Administrative District Council, and the Liquor Inspector.

In recent years the Ordinances which have been passed have endeavoured to create a workable system while leaving the large bulk of the old legislation in force. *The Small Debts Ordinance* (17) provides procedure for collection of debts up to $200.00 through the Small Debt Official. Execution may issue upon filing of certificate of judgment. However, at date, although there is authority for the appointment, and there is a sheriff at Fort Smith, there is none at Yellowknife, nor is there a sheriff's bailiff. It is also difficult to know just what exemptions are allowable (if any). With the passing of this new *Small Debts Ordinance* the old Rules contained in *The Judicature Ordinance* governing collection of small debts were not expressly repealed. For the most part the old Rules in this respect cannot stand with the new Ordinance. And yet if we are to consider that the new legislation has repealed the old Rules by implication we remove the right to garnishee either before or after judgment in small debt matters since that right was not dealt with in the recent *Ordinance*. Garnishee procedure is clearly available in large debt matters under the existing Rules which provide much the same restrictions as the Rules in force in the various provinces.

(16) R.S.C. 1927, Chap. 142, s. 5.
(17) Assented to Feb. 9, 1937.

No new system of tariffs either as to filing and court costs or taxable costs between solicitor and client has been inaugurated. It has been necessary for the magistrates to model a system to suit existing circumstances on those in use in the various provinces. *The Judicature Ordinance* refers throughout to a tariff but none is reprinted with it in any extant copies of the Revised Ordinances.

So much for the actual court set-up within the Territories itself. It is necessary at this point to refer to the concurrent civil jurisdiction exercisable by the superior courts of certain provinces. By section 35 of the *North-west Territories Act,* "The superior courts of the Provinces of Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, respectively, shall have and exercise in civil matters the like jurisdiction and powers with respect to persons and property in that portion of the Territories which lies west of the eightieth meridian of west longitude, and with respect to actions, suits and proceedings affecting them, as they have with respect to persons and property within the territorial limits of their ordinary jurisdiction, and to actions, suits and proceedings affecting them". Then follow sections 36, 37 and 38 providing the procedure, which is in fact the application of the Rules in force in these various Provinces in their ordinary jurisdiction.

It can be seen therefore that both small debt and large debt matters arising in the Territories and all other matters concerning citizens of the Territories can go before any of the Superior Courts so specified. This situation can and has given rise to numerous problems. For example, a defendant may be sued in the Supreme Court of Alberta at Edmonton, or similarly at Regina, Winnipeg, Toronto or Vancouver, and be a resident of the Territories and have all his defense witnesses in the Territories. He must defend and appear or lose the suit by default unless an order for a change of venue can be obtained. By section 4 of *The Judicature Ordinance,* a defendant may be sued in the Territories if the cause of action arose in the Territories. At the time of its enactment this section applied to both large debt and small debt matters. Section 4(b) of *The Small Debts Ordinance* (*supra*), which states that "No Small Debt Official shall try or adjudicate upon any claim under this Ordinance unless the defendant or some one of the defendants resides or carries on business in the Northwest Territories", is definite regarding actions brought under that Ordinance. But, as has been pointed out already, it may still be possible to conduct a small debt suit in accordance with the Rules governing

small debt procedure in *The Judicature Ordinance,* in which case as long as the cause of action arose in the Territories the defendant could be resident elsewhere at the time of commencement of proceedings. At any rate in large debt actions it appears that if the cause of action arose in the Territories the defendant may be sued in the Territories, or in British Columbia, Alberta, Manitoba, Saskatchewan or Ontario, whichever may happen to suit the plaintiff best, regardless of where the defendant may be residing.

There is no provision for reciprocal judgment enforcement between the Territories and the various provinces. Hence a judgment obtained in one of the five Provinces referred to in the Act, exercising its jurisdiction in the Territories, can be executed in the Territories. But a judgment obtained in the Territories must be sued on again in any of the provinces before it can be executed there. The practical difficulties of these interlocking jurisdictions are multiplied by the fact that during two seasons of the year, the "freeze-up" and the "break-up" periods, taking anywhere from three to seven or eight weeks each depending on weather conditions, the Territories is completely cut off from the "outside" except by radio communication.

The subject of appeals both civil and criminal causes particular difficulty. The Criminal Code makes provision for appeals to district and county courts and appellate divisions before the Supreme Court of Canada is reached. With no such courts in existence it is simply a matter of conjecture as to where appeals should go in the Territories from decisions of stipendiary magistrates. It has been suggested that two stipendiaries may sit *en banc* as a court of appeal, but aside from implication from old laws which governed the former judges of the Supreme Court of the North-West Territories (18) there seems to be no legal foundation for such an assumption. The conclusion can only be that appeals must be direct to the Supreme Court of Canada. In minor criminal offences and even major ones the costly nature of such an appeal would be prohibitive in the majority of cases.

There is no difficulty with civil appeals from decisions of the superior Courts of the various Provinces exercising their concurrent jurisdiction. They proceed in the same manner as any other appeal from these Courts. But it would appear that in civil cases also an appeal from a decision of a

(18) See R.S.C. 1886, c. 50, ss. 50, 53, 54 and 102.

stipendiary magistrate would have to be taken direct to the Supreme Court of Canada and would have to be a case meeting the requirements for appeals to that Court. The conclusion is that in certain cases not meeting those requirements the decision of the stipendiary magistrates must be final.

Provision is made for procedure in matters pertaining to probate in the Rules of Court. A few wills have been probated in the Territories before stipendiary magistrates and in such cases they have adapted the procedure to meet the circumstances. Since there are no forms provided it has been necessary for the magistrate to model forms after those in use in one of the provinces. For the most part estates which have required administration to date have been those of intestates. For that purpose a Public Administrator has been appointed. He resides at Edmonton, Alberta, and his duties include the administration of all intestate's estates within the Mackenzie District. The practical business of winding up an estate is done by the Royal Canadian Mounted Police stationed in the area acting upon instructions received from the Public Administrator. The method, of necessity, is awkward and gives rise to long delays and copious correspondence. A person with a valid claim against such an estate is put to so much trouble and annoyance that he must often feel it scarcely worth the effort to pursue his claim.

Regarding bankruptcy proceedings, there have been several instances in recent years where that has appeared to be the proper course of procedure. However, absence of an official receiver in the vicinity has been the main drawback. In addition, the *Bankruptcy Act* provides fairly complicated methods when it becomes necessary to apply them with the judicial machinery presently in use.

Tenure of land in the Territories is governed by the *Dominion Lands Act* (19). It varies somewhat in accordance with the locality. In the older settlements such as Fort Smith, an estate in fee simple may be acquired and title registered. However, even such land is dealt with as personal estate for purposes of descent (20). In other parts of the Territories, for example the Settlement of Yellowknife, the land is still held as quartz mining claims under the Regulations previously referred to (21). Surface lease rights are leased to companies and individuals by the Do-

(19) R.S.C. 1927, c. 113.
(20) See The Land Titles Act 1894 and amendments.
(21) See footnote 1.

minion Government at yearly rentals for periods of five years. Houses and other buildings are therefore treated as chattels within these areas.

At the present time there is no provision for the formation of Northwest Territories companies, *The Companies Ordinance* having been repealed February 9th, 1937. Nor is there provision for registering a foreign company, *The Foreign Companies Ordinance* 1905 having been repealed at the same time. Where incorporation is sought it is necessary to make application either for a Dominion charter or for a certificate of incorporation in accordance with the laws of one of the provinces.

One more word concerning administration generally. All forms of activity for gain within the Territories are licensed by the Commissioner in Council. Traders and trappers have always been licensed but of late years it has become increasingly difficult to obtain such licences. As a matter of fact, the present law provides that unless a person held a trapping licence on the 3rd day of May, 1938 (22), he cannot now obtain one. The object of this law is no doubt the preservation of game. I have not space nor time at my disposal here to outline the various arguments for and against this method, nor to discuss the numerous factors which must be taken into consideration, nor to comment on the various privileges which are still accorded religious bodies and the Hudson's Bay Company. Needless to say, however, there is considerable controversy on the subject.

To pursue the question of licensing, on April 1st, 1939, *An Ordinance Respecting Businesses, Callings, Trades and Occupations and the Issue of Licenses Therefor* became effective. In this *Ordinance* are listed all conceivable classes of gainful endeavour with their respective licence fees and penalties provided for carrying on any of these without such licence or licences having been first obtained from the Commissioner or some person or persons named by him. Section 13 provides, "The Commissioner may at any time suspend or cancel for cause any licence issued under the provisions of this Ordinance." Such licences must be taken out annually. It is impossible to compare this all embracing system of licensing with anything similar in any other part of the Dominion. It literally gives the Commissioner the power to keep certain persons from residing in the Territories at his discretion. It is not suggested that the law has been abused in this respect to date, but it is suggested that the spirit of these

(22) See s. 11 of the Northwest Game Act, R.S.C. 1927, Chap. 141.

licensing laws does not tend to promote settlement and development of the country, nor it is in line with the democratic ideals so much to the fore at the present time. Provincial legislatures are given powers of direct taxation for revenue purposes but they are not given sufficient authority thereby to prevent individuals or companies from carrying on their businesses within provincial limits. Perhaps the *Ordinance* referred to would be similarly construed if there were some procedure for determining the question. But what method could be used by a party who had been refused a licence even if he had sufficient funds to do anything about it is not clear.

Many people may contend that the Territories must continue to be administered by the present method because it is not ready to assume provincial status, or more generally, because it is not ready to undertake the responsibility of democratic government. Authors of that argument may also point out that the cost of providing democratic institutions would be exorbitant. Perhaps that is so. It is difficult to produce statistics to prove them wrong, nor can it be said truthfully that the majority of the population is sufficiently responsible to undertake self-government. Suffice it to say that a simpler, more democratic form of government might be found to assure a strong foundation for future development of the country.

HELEN PERKINS.

POLICE COURT PROCEDURE

A few weeks ago A. I. Millar, Esq., K.C., Police Magistrate, was the guest speaker at one of our more or less regular Law Club luncheons. Mr. Millar gave us valuable information concerning police court procedure. We felt that the very fact that many barristers seldom handle police court work made it desirable that we preserve a permanent record of this address for convenient reference. At our request His Worship kindly consented to prepare the following summary.

M. M. M.

The request made of me by Mr. Corbett was that I tell the students something about the police court, with the work of which, he told me, the students were unfamiliar. Many barristers have little criminal practice, and rarely, if ever, appear in police court. I can therefore appreciate Mr. Corbett's remark. The opportunity for students to observe in the police court being limited I may be of most assistance to you if I speak of police court work more as a practical experience than that I attempt to deal with the subject in an academic way. I will speak of the practice in the Edmonton City Police Court, which as you probably know deals with Mounted Police cases and infractions of City by-laws as well as the city police work.

Many complaints are made to the police, on which, after investigation, the police decide there should be no prosecution. They may find a complaint is unfounded. There may be insufficient evidence to justify a prosecution, or other reasons may exist why a prosecution should not be commenced.

One of the steps frequently taken in investigation is the obtaining of a search warrant to authorize a police officer to enter premises and search for and seize goods, books, papers or other things which may be evidence against an accused person. To authorize the issue of a warrant the officer will prepare an information for a search warrant, which information will contain particulars of the things to be searched for, the offence in respect of which the search is to be made, the premises to be searched, as well as the grounds of the officer's belief that the goods may be found. This information is signed by the officer and sworn to by him before the Magistrate. On this information the Magistrate issues the warrant which contains the date and the hours between which the search may be made.

Armed with the warrant the officer proceeds to make the search. The things seized (if any) are taken possession of by the officer and may later be used as evidence against the accused. A search warrant may be issued either before or after a formal charge or information is laid. For certain searches, for instance of a disorderly house, an order to search may be issued by a different procedure.

Should a prosecution be decided on, proceedings are started by the laying of an information and complaint. As a matter of practice most informations in the Edmonton Police Court are prepared, laid and sworn to by one of the Police Sergeants, who is the officer specially authorized on behalf of the police for that purpose. The information is sworn to before the Magistrate, and the required warrant for arrest of the accused, or Summons to Defendant is issued as well as summonses to witnesses. Whether a warrant or summons should be issued depends on the nature of the offence, the question of an accused appearing on a summons and such like factors. The wording of the information and complaint is important. If you require to make out an information I suggest you follow the wording of the section of the Criminal Code or Act as closely as possible. Other wording may in the opinion of the courts have another interpretation. Leaving out an essential word or words may mean an information does not disclose an offence. As an example under the damage to property sections the word "Wilfully" is of the essence of the charge. Without it the charge would show no offence. Frequently matters from outside are brought to the City Police Court to be dealt with. In these the information and complaint is often laid before an outside Magistrate or Justice of the Peace. The outside magistrate is seized with jurisdiction in the case and to authorize the city magistrate the outside magistrate writes on the information his waiver of jurisdiction. The city magistrate then has authority to deal with the matter.

The Criminal Code makes provision for persons being arrested without warrant in certain cases and under certain circumstances. Except in those cases an arrest should not be made unless the officer has first obtained a warrant to arrest. That warrant is not issued until after a formal information is laid and sworn to.

Should the accused be arrested and is waiting trial or preliminary hearing he may be admitted to bail. The magistrate's authority to grant bail is wide. Only in the most serious charges such as murder, rape or

treason is he not permitted to grant bail. On an application for bail the Magistrate will consider such matters as the nature of the offence, the punishment which may be imposed, the character of accused and the possibility of his failing to appear in answer to the charge. At that time his guilt or innocence is not in question. He is presumed to be innocent until his guilt is established. The bail should be such that it will assure his appearance in answer to the charge. An extensive annotation on the subject of bail is contained in Volume 47 of Canadian Criminal Cases. One reference given indicates the view that a recognizance taken on a Sunday is valid. Provision is also made under the Summary Convictions Act of the Province that when a person is brought into custody in a police station in a city or town between 9 p.m. and 9 a.m. of the following day charged with an offence against a provincial Act or a By-law he may be admitted to bail by the officer in charge of the station on the accused entering into a recognizance to appear in court within two days. In lieu of a recognizance a deposit of a sum of money and a written undertaking to appear may be accepted.

On the date fixed for the hearing the Court Orderly will call the name of the accused. Should it be that he has been summoned and he fails to appear, the prosecutor may ask for a warrant to arrest the accused for failing to answer the summons. Proof of service of the summons is given on oath. The serving officer may be called and his evidence taken on oath or the proof may be by affidavit. When proof is given the magistrate may issue a warrant to apprehend the accused.

When the accused answers, the charge is read to him by the Court Reporter, who acts in the Court Room as the Clerk of Court. The steps which follow will vary somewhat according to the nature of the charge. In practice charges may be placed in four classes, namely: (1) Summary Conviction matters, (2) Indictable offences triable summarily without the consent of the accused, (3) Indictable offences triable summarily with the consent of the accused, and (4) Preliminary hearings. The differences in matters under those headings are no doubt known to you. I refer to the classification only because it requires some change in our subsequent procedure.

If the matter is one of summary conviction, the Reporter after he has read the charge to the accused asks him if he pleads guilty or not guilty. On a plea of guilty, the officer in charge of the case gives a summary of

the facts. Accused is then given an opportunity to make a statement if he wishes to do so. The statements made by accused may be amusing, ridiculous or pathetic. Some disclose real repentance. Some warrant sympathy and others just talk to see how it works on the court. Should accused be represented by counsel he is given the opportunity to speak for his client. If the accused has a record of previous convictions the prosecutor will present the record to the court and the accused is asked if he admits it. The prosecutor adds any recommendations or comments he has to make. The statements made, recommendations and record are considered by the court and affect the penalty to be imposed. Accused is then sentenced.

The date of hearing, the plea and sentence are endorsed on the information by the reporter as acting clerk of court. That endorsement becomes the court record.

In considering sentence the court has in mind the nature of the offence and the extent to which it has been committed, the penalty prescribed by the Code or Act, the character and criminal record (if any) of accused and such matters, what is a fair punishment of the individual accused and not overlooking that it should be a punishment likely to deter others from committing a similar offence.

After sentence the information is transferred to the office of the Clerk of the Court. Should there be a fine and it is paid the accused is released. If the punishment is imprisonment or if there is a fine which is not paid, the Clerk of Court will make out a Warrant of Commitment which is signed by the Magistrate, and the prisoner along with the warrant is taken to gaol.

On a plea of not guilty the court hears the evidence adduced. The prosecution is conducted by the Prosecutor, counsel for defence being given the opportunity to cross-examine each witness. The defence counsel may ask for a dismissal at the close of the case for the prosecution. If this is refused, the defence evidence is heard, the defence being conducted by accused's counsel and the prosecutor cross examining. Then rebuttal, if any, is heard. Both counsel are heard in argument. Accused is then found guilty or discharged. If the accused is found guilty the next procedure is as I have already mentioned.

In indictable offences triable summarily without the consent of the accused, the magistrate is given jurisdiction by Sec. 777 of the Criminal

Code. The procedure followed is the same as I have stated. Matters triable in this way are set out in Sec. 773 of the Code. In these cases the penalties which the magistrate may impose are set out in Sec. 778 of the Code and following sections, and differ from those the Code authorizes a Judge to give.

The magistrate may also try other indictable cases with the consent of the accused. His jurisdiction is given by Sec. 774 of the Code and extends to a wide range but excludes murder, manslaughter, rape, attempted rape and others such as seditious offences and offences against the State. In most instances the penalties the magistrate may impose are those which may be given by a Supreme Court Judge. In matters under this heading after the charge is read, the election provided by Sec. 781 of the Criminal Code is given to the accused. Should the accused elect for trial before the magistrate the accused is asked to plead to the charge and the case proceeds in the same way as I have before mentioned. The election should be endorsed on the information. The formal conviction and the warrant of commitment in these cases should also contain words to the effect that the accused elected to be tried summarily before the magistrate.

Should the accused not elect for trial before the magistrate the matter is proceeded with as a preliminary inquiry.

When the matter is dealt with as a preliminary inquiry, the charge is read to the accused but he is not asked to plead. The prosecution evidence is taken, cross examination being allowed, and the case for the Crown is closed. Defence Counsel may then ask for dismissal. The prosecution evidence should show that an offence was committed and that the accused committed it. The evidence should be sufficient to show the magistrate that the case should be sent to a higher court for trial. The credibility of witnesses is rightly one to be left to the Judge. Questions of sufficiency of corroboration and such like are matters for the higher court. When the magistrate is satisfied the matter should go to the higher court, the accused is given the warning provided for in Sec. 684 of the Criminal Code. The accused is given the opportunity to make a statement or give defence evidence if he wishes. Whatever he says is taken down by the Reporter and is transcribed as part of the proceedings. It may be used against the accused at the trial. As a matter of practice defence counsel almost invariably replies to the warning that the accused has nothing to say and the defence is reserved. The magistrate may then

commit the accused to gaol to await his trial or may admit him to bail to appear for trial. Before the magistrate has made his final disposition of the matter, defence counsel will make his application for bail. After the magistrate has made his order of commitment accused may be admitted to bail only on the order of a Judge of the Supreme Court. In preliminary inquiries counsel for defence usually conduct their cases so that as little indication as possible is given by cross examination of the nature of the defence. The refusal to say anything may have that in mind. Defence counsel tries to obtain as much as possible of the prosecution's case without disclosing the defence. However, even expert counsel sometimes by cross examination bring out points which strengthen the case against the accused. While some counsel ask few questions in cross examination, others in some instances cross examine at length and in considerable detail. Naturally the nature of the case may affect the necessity for cross examination. Seldom is defence evidence given. The preliminary not only satisfies the magistrate that there is or is not a case to go to the higher court, but from the prosecutor's angle it has advantages. It establishes on oath what the witnesses have to tell. They are unlikely to vary their statements in a higher court. The evidence obtained enables the Crown to decide what indictment should be laid. The indictment may vary from the charge. The Crown is not obliged to call all the witnesses who gave evidence at the preliminary, and it may adduce other evidence.

A commital or remand for trial by a magistrate does not bind the Crown to proceed to trial. On review of the evidence the Crown may enter a stay of proceedings.

There are some slight variations in practice between the Police Courts of Edmonton and Calgary, which arise from a different distribution of the work or from ideas of local magistrates. They are not important.

My effort has been to say something of a practical nature which may help you to more readily follow the work of the police court. I have tried to be neither complete or comprehensive. My hope is that it may be of some assistance to you now or in your later experience.

A. I. Millar, K.C.

THE DOMINION SUCCESSION DUTY ACT

1941 4-5 George VI C. 14

On June 14th, 1941, the Governor General assented to the Dominion Succession Duty Act, and the Federal Government for the first time in its history entered the field of Inheritance Taxation. As yet the provinces have not relinquished their inheritance taxes, and it does not seem likely that they will do so in the near future. The Rowell-Sirois Report recommends that the provinces abandon this field of taxation, but at the recent conferences between the representatives of the dominion and provincial governments the surrendering by the provinces of certain forms of taxation was discussed so that the dominion could better finance its war effort but no reference was made to inheritance taxation. Thus for a while at any rate we will have double taxation. As a matter of fact two provinces can and often do tax the same property. If X dies leaving property in province A while he is domiciled in province B then provinces A and B and the dominion will all tax this property. Can we regard the Dominion tax as a temporary war measure? Probably not, for Finance Ministel Isley himself said that it would more than likely be a permanent form of taxation.

An inheritance tax is dependent upon two things, first the size of the estate of the deceased, and second the relationship to the deceased of the beneficiaries. Under the Dominion Act there are really two taxes, first a tax on the aggregate net value of the estate which is the value of all the property comprised in the estate less any just debts or encumbrances and reasonable funeral expenses and probate fees, but not solicitors' fees. However, this tax is very small, and is non-existent for any estate of a value less than $25,000.00. There is also a tax on the dutiable value of a succession. That is dependent upon the relationship of the beneficiery to the deceased, and also the rates of taxation are dependent upon the same relationship.

Whom does the Act effect? It affects all domiciled Canadians, whereby they pay a tax on real and personal property situated in Canada, and all personal property situated outside Canada. For those Canadians domiciled outside of Canada, the Act affects all personal and real property, except insurance, situated in Canada.

The next question we ask ourselves is what is "property" within the meaning of the Act, and hence liable to succession duties. Property in-

cludes both real and personal property, held solely or jointly by the deceased and some other person or persons, although only that part contributed by the deceased is taxable. It includes annuities, and other like interests, and insurance policies on the life of the deceased; and also property disposed of by the deceased by certain types of gifts before his death. These gifts include any property given in contemplation of death, regardless of how far away that death might seem to be. If property is given several years before death it may be exceedingly difficult to determine whether or not that property was given in contemplation of death, unless of course the donor expressed his purpose at the time of making the gift. It also includes any *donatio mortis causa,* and any property in which the donor still retains the use and enjoyment; any outright gift made within three years preceding the deceased's death, if made on or after the 29th of April, 1941. (Under the Succession Duty Act of Alberta this period is not three but ten years.) It also includes any gift by an instrument other than a will, and this applies to dower and marriage settlements. Also included is the creation or discharge of a debt without value, and any property sold on or after the 29th of April, 1941, and within three years of the death of the deceased for which the consideration is only partial. In brief any gift made by the deceased before his death which was not part of his normal expenditures is taxable. To the executor falls the task of valuing all this property. The value of an article for taxation purposes then is the fair market value, that is the saleable value of the article, at the date of the death of the deceased. Not the price the deceased paid for it, not the price it would realize if sold when the duties are paid, but the price it would realize at the date of the death of the deceased. The debts which can be deducted must be *bone-fide* debts, but do not include succession duties due other jurisdictions.

Certain exemptions are allowed, and these when deducted from the aggregate net value give the dutiable value on which there is a tax, the rates of which, as given in the First Schedule of this Act, depend upon the class into which the beneficiary falls. Class A includes widows and certain dependent children and certain grandchildren, Class B grandfathers, grandmothers, fathers, mothers, husbands, sons-in-law, daughters-in-law, and children over the age of 18 years, Class C any other person of lineal ancestry, and Class D strangers and persons in other degrees of consanguinity. What then are the exemptions that are allowed? A wife is allowed an exemption of $20,000 and this exemption is increased by an

amount of $5,000.00 (less any benefit the child may have received) for each child. In cases where the deceased is the surviving parent of the child, there is an exemption of $15,000.00 for the child or children, and this is increased by $5,000.00 for each child. At this point we can quite easily see that when the deceased leaves his estate to those directly dependent upon him there is no tax unless he is in comfortable circumstances; the estate of a man of moderate means is only taxed when the property is not left to immediate dependents; and the poor man's estate is not taxed at all. Thus this Act meets the objection of inheritance taxation on the ground of endangering the livelihood of dependents. Certain gifts are also exempt; such as charitable gifts provided they do not exceed 50% of the total estate, any gift to the Dominion or Provincial governments, any gifts made before April 29th, 1941, and any gift on which the Gift Tax has been paid, unless the Succession Duty exceeds the gift tax. (The Dominion Income War Tax Act imposed a Tax on certain gifts (1).) Moreover regardless of the relation of the beneficiary to the deceased there is no dutiable value tax if an individual successor receives less than $1,000.00. The Act also provides for an increase in the exemptions if a man dies while serving ih His Majesty's Armed Forces, and even, in certain conditions, if he should die while serving in the Armed Forces of allied powers. Once more, there is an exemption to protect the poor man, namely, if the aggregate net value is less than $5,000.00 there is no dutiable value tax regardless of the relationship of the successor to the deceased. The net tax payable to the government then is the sum of the tax on the aggregate net value and the tax on the dutiable value of the estate.

What part does an executor of an estate play in the settlement of the Succession Duties under this new Act? Upon him onerous duties are imposed, backed by heavy penalties. The executor is charged with the responsibility of paying the duty to the Minister, but since this is the personal responsibility of the beneficiaries the executor is liable in his capacity as executor only. The executor's first task is to file an inventory with the Minister. This inventory must be filed within six months of the date of the death of the deceased, and must contain, first a list of all the beneficiaries and their degree of relationship, if any, to the deceased, and second a list of all the taxable property of the deceased together with the realizable value of each article at the date of the death of the deceased.

(1) See Statutes of Canada 1935, Chap. 40; and Statutes of Canada 1940, Chap. 18.

There are two matters that are likely to cause a great deal of trouble for inexperienced executors, first this inventory must be filed without notice or demand from the Minister, and second there is nothing specifically mentioned in the Act to the contrary so that it would seem that an inventory must be filed for every estate, even though it is so small that it is not taxable. There is a penalty provided for the failure of an executor to file this inventory and if it is enforced in all cases, ordinary people who are appointed executors of small estate might find themselves in unexpected difficulties. From this inventory the Minister calculates the amount of tax due and notifies the executor, who then pays it. The duty is payable within six months of the date of the death of the deceased, and if it is not so paid interest at the rate of 5% per annum will be charged. Thus if an executor takes six months to file the inventory, which he is allowed to do, he will not be able to pay the tax within six months and the estate will be charged with interest. The Minister may not be satisfied with the inventory. To verify the inventory, if he so wishes, the Minister may compel persons to make statements to him, or he may compel the production of documents, or appoint another party to inquire into any property. The Minister must defray the expenses of any such investigation. Life interests, interests in expectancy, and annuities have special provisions as to valuation and the time when the duty is payable. After the duty is paid, certain problems may also arise. For instance, an executor may demand a certificate of discharge either for payment of the duties or for acknowledgment that no duties are payable, but this certificate need not be granted until one year after the death of the deceased, nor does it protect the executor in case of fraud or failure to disclose material facts. What happens when the executor makes an overpayment of duties? The Act provides that the Minister may, but is not bound to, within one year and no longer after the death of the deceased, refund the amount of the overpayment.

Just as the Minister need not accept the inventory, the executor need not accept the assessment made by the Minister. Although certain steps are provided for the executor's appeal there is a time limit for each step, and if this time limit is not complied with the right of appeal is lost. The executor after receiving the notice of assessment must either pay the duty or file an objection, called a notice of appeal, the form being provided in the Second Schedule of this Act. The Minister replies to this by either affirming or amending his assessment. If the executor is still dissatisfied he files what is called a notice of dissatisfaction. After this, and upon

filing security for costs, the matter is then for the first time taken into court.

Aside from certain penalties which the Act provides for the violation of certain duties either by the executor or by any one else who happens to be bound by the Act, there are certain prohibitions established. Before delivery of any of the property of the deceased to the beneficiaries the executor must either pay the duty or furnish security satisfactory to the Minister. At this point is seems advisable to mention the value of having some form of property which can readily be converted into money, such as insurance policies. This will avoid the risks of loss often involved in the forced sale of property or securities. These readily converted funds can be then assigned to pay the duties. No Canadian Company or concern may transfer to any person without the written consent of the Minister any property or the money due under an Insurance policy. This does not apply to policies for an amount less than $1,500.00. Furthermore until the consent of the Minister is obtained no safety box or other depository of the deceased may be opened, and without this consent the will of the deceased cannot be removed from such a box.

The rates under this Act are progressive, with an upper limit of 17%, which is considerably lower than that of Alberta, and is so designed that an increase in the size of the estate by a few dollars does not disproportionately increase the duty payable, as it does in some provincial Acts.

J. T. Burger.

FIRST SCHEDULE

RATES OF DUTY

Aggregate Net Value		Initial Rates Dependent on Aggregate Net Value	Dutiable Value		Additional Rates Dependent on Dutiable Value			
Exceeding	Not Exceeding		Exceeding	Not Exceeding	Class A	Class B	Class C	Class D
$	$	%	$	$	%	%	%	%
.....	.....	.....	1,000	1,800	....	1.0	2.0	2.5
.....	.....	.....	1,800	2,600	....	1.2	2.1	2.6
.....	.....	.....	2,600	3,400	....	1.4	2.2	2.7
.....	.....	.....	3,400	4,200	....	1.6	2.3	2.8
.....	.....	.....	4,200	5,000	....	1.8	2.4	2.9
5,000	6,000	.....	5,000	6,000	2.0	2.0	2.5	3.0
6,000	7,000	.....	6,000	7,000	2.05	2.1	2.6	3.1
7,000	8,000	.....	7,000	8,000	2.1	2.2	2.7	3.2
8,000	9,000	.....	8,000	9,000	2.15	2.3	2.8	3.3
9,000	10,000	.....	9,000	10,000	2.2	2.4	2.9	3.4
10,000	13,000	.....	10,000	13,000	2.25	2.5	3.0	3.5
13,000	16,000	.....	13,000	16,000	2.3	2.6	3.1	3.6
16,000	19,000	.....	16,000	19,000	2.35	2.7	3.2	3.7
19,000	22,000	.....	19,000	22,000	2.4	2.8	3.3	3.8
22,000	25,000	.....	22,000	25,000	2.45	2.9	3.4	3.9
25,000	27,000	0.5	25,000	27,000	2.5	3.0	3.5	4.0
27,000	29,000	0.6	27,000	29,000	2.6	3.1	3.6	4.2
29,000	31,000	0.7	29,000	31,000	2.7	3.2	3.7	4.4
31,000	33,000	0.8	31,000	33,000	2.8	3.3	3.8	4.6
33,000	35,000	0.9	33,000	35,000	2.9	3.4	3.9	4.8
35,000	36,500	1.0	35,000	36,500	3.0	3.5	4.0	5.0
36,500	38,000	1.05	36,500	38,000	3.05	3.55	4.1	5.1
38,000	39,500	1.1	38,000	39,500	3.1	3.6	4.2	5.2
39,500	41,000	1,15	39,500	41,000	3.15	3.65	4.3	5.3
41,000	42,500	1.2	41,000	42,500	3.2	3.7	4.4	5.4
42,500	44,000	1.25	42,500	44,000	3.25	3.75	4.5	5.5
44,000	45,500	1.3	44,000	45,500	3.3	3.8	4.6	5.6
45,500	47,000	1.35	45,500	47,000	3.35	3.85	4.7	5.7
47,000	48,500	1.4	47,000	48,500	3.4	3.9	4.8	5.8
48,500	50,000	1.45	48,500	50,000	3.45	3.95	4.9	5.9
50,000	52,500	1.5	50,000	52,500	3.5	4.0	5.0	6.0
52,500	55,000	1.55	52,500	55,000	3.55	4.1	5.1	6.1
55,000	57,500	1.6	55,000	57,500	3.6	4.2	5.2	6.2
57,500	60,000	1.65	57,500	60,000	3.65	4.3	5.3	6.3
60,000	62,500	1.7	60,000	62,500	3.7	4.4	5.4	6.4
62,500	65,000	1.7	60,000	65,000	3.75	4.5	5.5	6.5
65,000	67,500	1.8	65,000	67,500	3.8	4.6	5.6	6.6
67,500	70,000	1.85	67,500	70,000	3.85	4.7	5.7	6.7
70,000	72,500	1.9	70,000	72,500	3.9	4.8	5.8	6.8
72,500	75,000	1.95	72,500	75,000	3.95	4.9	5.9	6.9
75,000	77,500	2.0	75,000	77,500	4.0	5.0	6.0	7.0
77,500	80,000	2.05	77,500	80,000	4.1	5.1	6.1	7.1
80,000	82,500	2.1	80,000	82,500	4.2	5.2	6.2	7.2
82,500	85,000	2.15	82,500	85,000	4.3	5.3	6.3	7.3
85,000	87,500	2.2	85,000	87,500	4.4	5.4	6.4	7.4
87,500	90,000	2.25	87,500	90,000	4.5	5.5	6.5	7.5
90,000	92,500	2.3	90,000	92,500	4.6	5.6	6.6	7.6
92,500	95,000	2.35	92,500	95,000	4.7	5.7	6.7	7.7
95,000	97,500	2.4	95,000	97,500	4.8	5.8	6.8	7.8
97,500	100,000	2.45	97,500	100,000	4.9	5.9	6.9	7.9
100,000	102,500	2.5	100,000	102,500	5.0	6.0	7.0	8.0

Figures for higher values are set out in the Schedule, but we thought that casual interest in such figures in Alberta did not justify the expense of reprinting. —M. M. M.

SOCIOLOGY OF LAW, by *Georges Gurvitch,* Ph.D., LL.D., D. ès L., pp. xx 309. Philosophical Library and Alliance Book Corporation, 212 Fifth Ave., New York. $3.75. With a preface by Roscoe Pound.

Dr. Gurvitch is a distinguished European scholar and the author of several studies in his field. He is professor at the New School for Social Research (New York).

This book is divided into an introduction and five chapters. The introduction, in explaining the meaning of the title, asserts that it is the study of the material common to Jurisprudence (I use the word broadly) and Sociology. "In this middle ground," states the author, borrowing a quotation, "the pickaxes of the two crews each hollowing out its respective gallery, have finally met." Despite the author's claim to the inclusion of Pound, Holmes and Cardozo (as fellow travellers at this point, and as forerunners later) my impression is that the author's approach is more sociological, i.e. purely descriptive of behaviour patterns, than is that of the gentlemen above named. Professor Gurvitch pays but slight attention to law in the lawyer's sense and ignores the pragmatic utilitarianism which is the whole motive and motif of Pound's writings—even when he is busy explaining the thought of others.

In expanding his original assertion our author attacks English and American analytical jurisprudence and Continental philosophical jurisprudence of the nineteenth century as partial, superficial, and out of touch with reality. This section has two aims: (1) to demonstrate the sterility of any thinking about law which attempts to consider it solely in terms of itself, or in terms of a preconceived philosophy which seeks to buttress its own validity with fragments taken from contemporary legal rules; (2) to demonstrate the gradual abandonment of all other approaches in favour of one firmly based on Sociological knowledge. As to the first, the author accomplishes his purpose. The second generalization cannot be made out without omitting Hans Kelsen, one of the most significant writers for all who would think about law. Subject to that qualification the general trend is as is indicated by Professor Gurvitch. And Kelsen need not spoil our picture just because he does not fit into it. He offers an indispensable epistemological catharsis, but after facing his acute and perhaps terrifying revelations we can turn back to practical matters, even as we can go on living after the first shock of a detailed knowledge of physiology.

Our author then proceeds to trace the broadening out of Sociology from Comte's original mechanical positivism to what he calls the Sociology of the

human spirit, "the study of cultural patterns, social symbols and collective spiritual values and ideas in their functional relations with social structures and concrete historical situations of society." Having shown the interdependence of Jurisprudence and Sociology the book proceeds to a definition of Law and of the Sociology of Law. So ends the introduction (on page 69).

Chapter I (129 pages) is entitled the Forerunners and Founders of the Sociology of Law. It presents gleanings emphasizing the sociological aspects of the long list of writers whose views supply the background for Jurisprudential discussion. This history is carried through to include recent American writers among whom Karl Llewellyn receives a good deal of attention. At this point the book devotes six pages to Roscoe Pound. The first four are filled with enthusiastic exposition, in which the Theory of Interests is merely mentioned. The last two pages are interspersed with mild criticism. This criticism is interesting in that it attacks a man of straw. Pound is first postulated as a writer on the Sociology of Law who must (by definition) eschew legal philosophy and who must (by definition) not be primarily interested in law in the lawyer's sense and is then criticized for being what he is and for not being what he is postulated to be. This is in one sense hardly fair, but it does show that our author is a consistent Sociologist of Law, and not what he does not pretend to be—a Sociological Jurist. He himself draws the distinction earlier in his book.

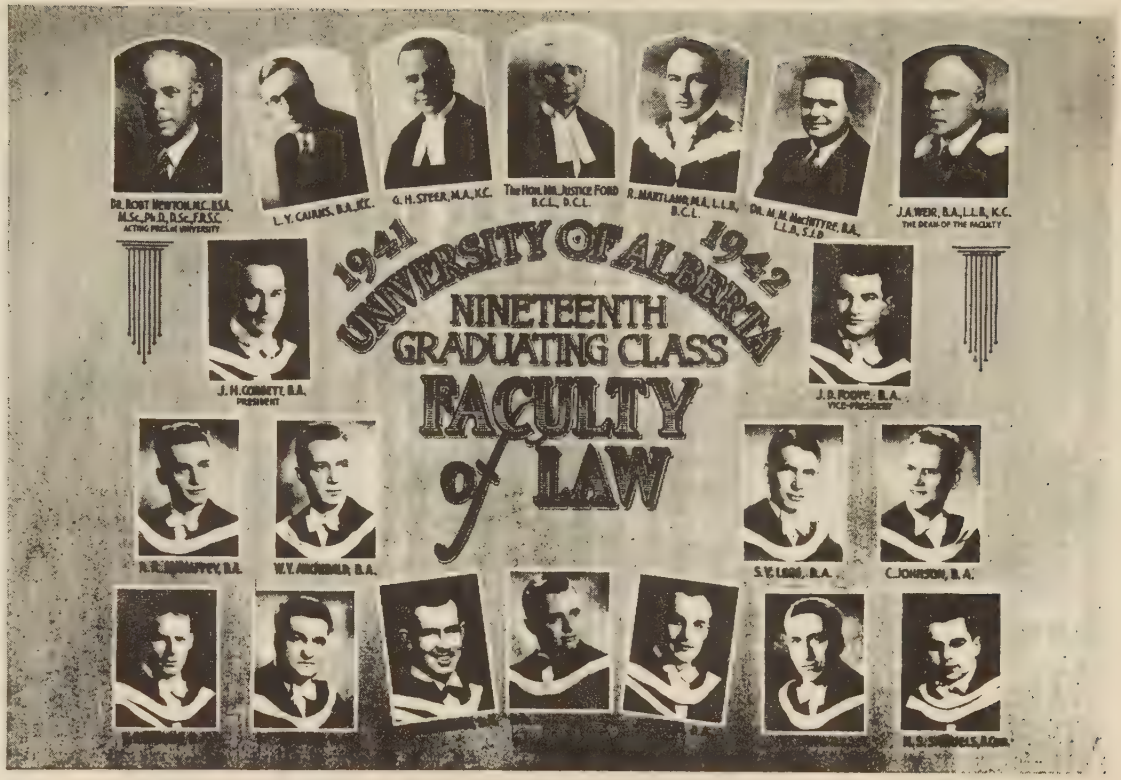
After this preparation the reader is led in Chapter 2 into the Systematic Sociology of Law (sub-title The Microsociology of Law) and then in Chapters 3 and 4 through The Differential Sociology of Law (sub-titled Chapter 3 *Jural* and Chapter 4 *Legal* Typology of Particular Groupings). In these chapters the author offers a complex scheme of abstract classification. Throughout the book and underlying this formidable network of classification runs an undercurrent of metaphysical psychological anthropology. The discussion abounds with concepts unfamiliar to the American lawyer, for example, "interpenetrated consciousness," "collective mind," "reciprocal immanence," or "mutual participation of the unity in the plurality and the plurality in the unity."

Chapter 5 is entitled the Genetic Sociology of Law. It renounces a straight line evolutionist approach, once so popular, to the development of jural institutions, but seeks to offer a methodology for tracing tendencies of change and the factors involved in change in the life of the law. A few pages entitled Conclusion re-emphasize the author's conceptions of the interdependence of Jurisprudence and the Sociology of Law already set out in the Introduction.

Taken as a whole, the book, though extremely learned, is abstract and its terminology unfamiliar. American legal scholars may not find it as meaningful as would Sociological scholars. On pages 282-6 inclusive the author addresses himself to present problems of world wide significance. As he sees it, the struggle for power between organized labour and organized capital threatens the State and provokes its desperate efforts to "integrate them within itself, in order the better to enslave them as organs of the State by a semblance of a corporative organization of industry imposed from outside. This of course can be done only by virtue of a personal dictatorship displaying all the traits of charismatic power. . . ." As a possible alternative to this he offers on page 284 what seems to me to be Guild Socialism or Syndicalism.

As a forecast this picture does not overflow with optimism. Perhaps this interpretative analysis is misleadingly simple. After all the "State" is a metaphysical abstraction. Within the geographical limits of the territories from which the author's generalizations are drawn revolutions have taken place. A revolution involves legal and political discontinuity. The revolutionary party acquires power and a new "State" results. It is not quite accurate to describe revolutionary activity in terms of continuity just because the "State" can be written about as if it were a continuous conscious something with anthropomorphic desires. Whether we will see other revolutions with an emphasis on terror and charismatic power is another question. It seems to me that the bases for an answer are both broader and narrower than the author indicates. Recent internal revolutions have succeeded through widespread despair which turned to belief in miracles to supply the hope which man insists on having whether it is a probable hope or not. This type of behaviour is not confined to an urban industrialized society, as is the contest referred to by the author. One hears forebodings of what will happen after the war. These are justified on the assumption that governmental economic policy is as unenlightened then as it was in the early thirties because the human element will be in a state of less stable equilibrium. But this is not an essay on post war planning, although such things should be written by those of us who have no special dogma to expound except the preservation of the dignity and freedom of the individual—which can be threatened from within any geographical boundary; that warning of Professor Gurvitch should not be entirely forgotten.

M. M. MacIntyre.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DR. ROBT NEWTON, M.C., B.S.A., M.Sc., Ph.D., D.Sc., F.R.S.C.
ACTING PRESIDENT UNIVERSITY
L. Y. CAIRNS, B.A., K.C.
G. H. STEER, M.A., K.C.
THE HON. MR. JUSTICE FORD B.C.L., D.C.L.
R. MARTLAND, M.A., L.L.B., B.C.L.
DR. M. M. MACINTYRE, B.A., L.L.D., S.J.D.
J. A. WEIR, B.A., L.L.B., K.C.
THE DEAN OF THE FACULTY
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C. JOHNSON, B.A.

EDITORIAL NOTE

The Rules Revision Committee has approved our publication of this brief and generously supplied us with a memorandum setting out additional changes suggested to it by other parties who had taken the trouble to submit briefs. The Quarterly hopes that its publication of these suggestions will afford an opportunity to the profession to consider them, and offers its pages for general discussion of the problems raised. We would be delighted to have the profession regard the Quarterly as a forum for professional discussion on this or any other occasion.

M. M. M.

REPORT RE RULES OF COURT

Pursuant to the request of the executive of the Calgary Bar Society a committee consisting of S. J. Helman, K.C., J. J. Saucier, Harold Riley, W. H. Epstein and A. D. Bessemer, with the first named as chairman, and the last named as secretary, was appointed to consider and deal with the question of the revision of the Rules of Court with a view to ascertaining the views of the local members and making suggestions to the main committee which had been appointed to make the revision. With this end in view your committee canvassed the Calgary Bar for suggestions and had a number of meetings in which the suggestions so made and the suggestions proposed by various members of the committee were debated and considered. This committee feels that the time allotted to them for this work has been inadequate and they are therefore only able to deal with the wider aspects of the questions involved and some of the more apparent inconsistencies. The work they have done, however, has impelled them to the conclusion that they should urge upon the main committee the desirability that the revision now proposed should not be a more or less mechanical consolidation of the Rules but should be carefully and thoroughly undertaken. The opportunity may not again be given to the profession for some time to make such a revision and the many matters mentioned in this report makes it abundantly clear that a complete revision of the Rules should be undertaken in which will be embodied such changes as experience has demonstrated would be desirable.

Directions

It seems to be the almost unanimous opinion of those members of the Calgary Bar who have expressed their views in the matter that the provisions contained in the Rules respecting direction have proved largely

nugatory. In place of the present Rules your committee would respectfully suggest:

(a) That the provisions now contained in the ordinary consent order for directions be provided for by the Rules without the necessity of any special order. These are—

Production of documents,

Discovery,

Fixing of the date of the trial by the Clerk of the Court.

With regard to the question of fixing the date of the trial, it is suggested that the date of the trial should be fixed by the clerk only after notice to the opposite party.

(b) The difficulty with respect to the present order, it is felt, has been the fact that it comes too early in the proceedings and before there has been discovery and the parties are thoroughly conversant with the issues. In order to eliminate this difficulty, it is suggested that the Rules provide for a pre-trial conference. At the time that the date of trial is fixed the clerk should allocate the case to a designated judge and within a specified time before the date of the trial (say two weeks) a conference should be held by counsel with the judge in which the issues involved will be thoroughly canvassed. The judge will then seek to settle the issues, provide for any amendments that should be made so that such issues will be clearly before the court, determine the facts the parties are prepared to admit, direct the method of proof of other facts which may be proven by affidavit or by the production of books of account, and in a general way do all the things that it had previously been hoped would be done on the order for directions. It is to be observed that such a pre-trial conference has been recommended by Wigmore (3rd Ed. Volume 9, page 335 to end of volume) and provision for it is contained in the new federal rules of court recently promulgated in the United States. (See discussions of this whole question by the committee on pre-trial procedure, Report of the Section of Judicial Administration of the American Bar Association, 1938.) In jury cases such a pre-trial conference will obviously be of the greatest value where problems respecting the burden of proof and questions to be submitted to the jury may be discussed and settled.

Statement of Defence

The Rules should provide that where a defence is filed all matters not admitted should be taken to be denied. This will eliminate the needless

expense of pages of denials which have largely become automatic and are a waste of time and money.

Discovery

The result of the decision of MacGregor vs. the C.P.R. (1938) 2 W.W.R., 426, and the subsequent case of Edmonton vs. W. W. Sales Limited (1939) 2 W.W.R., 329, where it was held firstly by our appellate division that an officer does not have to either accept or reject the statement of any employee relative to an event and the subsequent ruling of Mr. Justice Howson in the case last above noted whereby the statement of such employee, which the officer refused to either admit or reject, may not be put in evidence as being hearsay has completely emasculated the rule. Your committee wishes to suggest that the rule be altered so that the decision of our appellate division should be rectified and the practice placed on the basis set out in the judgment of Mr. Justice Howson in the MacGregor case (1938) 1 W.W.R. 865, or that the statement of the employee in such case may be admitted as evidence with the explanation of the officer as to why he refuses to accept or reject the statement in question.

It is also respectfully submitted that the right of examination should not be limited to employees, but should be broadened to include all witnesses (see rule 26 of the New Federal Rules). The suggestion respecting costs set out in the next heading will provide a salutary check on any suggested abuse of this extension. No one can deny that all extensions of the right of discovery have led to closer approximation of truth.

The right to examine an officer of a corporation should include a right to examine some one on behalf of the Crown in an action against the Crown.

Costs of Discovery

The rule should be that the discovery of the parties or of the named officer of the corporation, if one of the parties is a corporation, should be included in the costs taxed to the successful party without any special order relative thereto. The costs of examining employees or witnesses should be borne by the examining party unless otherwise ordered.

Privilege

It has been found that in some instances the claim for the privilege of documents has been abused and the opposite party should be entitled to have any documents produced for the examination of the judge without

any special order in order to have the judge ascertain whether the privilege has been properly claimed. If the privilege has been properly claimed no costs should be given to either party of the application, but if the privilege has been improperly claimed costs should be given against the party setting up the privilege.

It has also been found that many corporations in order to avail themselves of a pretended privilege have had the reports of the eye witnesses of accidents or other occurrences headed with the statement that such reports are made for the solicitors of the company and in this way they have effectively prevented the discovery of the most useful evidence that is available. No evidence could lead more to the ascertainment of the truth than a report of an eye witness made immediately after the accident or occurrence and it is urged that all such reports should be subject to production and that no privilege should be available relative thereto. The subsequent discovery of an employee can not properly take the place of the spontaneous report made at the time of the accident or other occurrence.

Originating Notices and Petitions

It is suggested that all the provisions relative to originating notices and petitions be eliminated and that all such proceedings whether under the rules or under any Statute may be commenced by notice of motion with the stipulation that where the notice of motion is being served on a party it should contain a notice that judgment may be given against the party upon whom it is served if such party fails to attend at the hearing. It is urged that in this way the procedure will be greatly simplified and no harm will be done. The elimination of the cumbersome writs of Habeas Corpus and Certiorari has not caused the slightest inconvenience and this change will be equally beneficial.

In *ex parte* applications made either under the rules or any Statute it should not be necessary to file any documents except the order when granted and the material in support.

Grouping of Rules

It is submitted by your committee that some thought should be given to the question of regrouping the Rules so that certain matters will be dealt with more conveniently under specific headings. Some Rules contain within them several matters and make them difficult to find. Particular trouble is experienced by the profession with regard to the rules commencing at 206 and ending at 217.

Rule 207

The number of complaints received by the committee relative to this rule has exceeded the complaints or suggestions that have been made with respect to any other rule. It should be broken up into its three separate subject matters, each of which should be given a specific number. The provision that a notice of motion shall not be proceeded with after the expiration of one year, except with leave, is considered a salutary one and it is suggested that this rule be extended to cover not only a notice of motion but any step in the cause. In many instances an order *nisi* will be held for a considerable period and not entered. No such order should be subsequently entered, except with leave, and after notice to the opposite party.

Appeals to the Appellate Division in Practice Matters

Appeals in practice matters should be speeded up and it is submitted that the notice of appeal should be given in five days and the appeal should be entered for hearing at the next sittings after the notice of appeal is given. Appeal books and factums should be dispensed with in such cases, but either party may file a note of the authorities relied on.

Cost of Appeals

The cost of appeals to the appellate division are entirely inadequate to cover the work that is involved. These costs should be doubled or trebled.

The Time for Hearing Ordinary Appeals

There is some complaint that the sittings of the appeal court at Calgary and Edmonton every two months works a hardship in many instances, and it is suggested that the old practice that a sitting be held every month should be reinstated or in the alternative that either party may enter an appeal for hearing either at Edmonton or Calgary upon paying an additional $50.00 by way of expense to the opposite party in order to expedite the hearing of appeals in important matters.

Appeal Books

It would be found that if all exhibits were typed in chronological order (this is required in the Supreme Court) that a great deal of time would be saved and the evidence more easily understood. The index could show the place in the evidence where the exhibit was filed.

It is also submitted that appeal books and factums should be printed on the right and not the left side of the paper.

Service Out of the Jurisdiction

The necessity for obtaining an order for service out of the jurisdiction should be abolished and therefore in Rule 204 the words, "may be allowed by a judge" should be struck out and the words "may be made" substituted therefor.

Technical Objections

Rule 272 should be struck out and the following Rule, taken from Manitoba, should be substituted:

> "A proceeding shall not be defeated by any formal objection, but all necessary amendments may be made, on proper terms as to costs or otherwise, to secure the advancement of justice, the determining the real matter in dispute and the giving of judgment according to the very right and justice of the case."

Reserved Judgments

If any judgment is reserved for longer than three months either party may have the case or matter entered for rehearing before another judge and thereafter the original judge shall not have jurisdiction to deliver a judgment and he shall be notified accordingly by the Clerk.

Evidence

Discovery may be used on any motion as well as at the trial.

Affidavits may be sworn before the cause is commenced.

All material must be filed with the notice of motion and should be served with the notice of motion.

The notice of motion should be filed before being served.

Forms of Judgment and Orders

Draft forms of judgments and orders should be added to the schedule so that there may be more uniformity in that regard.

Juries

If the right to a jury trial is retained, and this committee thinks it should be, then the amount to be paid for the jury should not be the prohibitive sum it now is. Part, if not all, of the jury fees should be absorbed by the state. At the present time it costs from $350.00 to $1,000.00 to have a jury. The parties do not have to pay for the judge or the court facilities. The rule in respect to a jury should be the same. At the present a poor man cannot get a jury. The cost to the litigants of

a jury should not exceed $100.00. A jury is primarily supposed to protect the rights of the poor man. The situation as it now exists is that only a rich man can afford a jury.

Index

The present index is not satisfactory and a more comprehensive one should be prepared. Mr. Norman Plummer of Calgary has had an index he has prepared in his possession for some years. We do not know whether he would make it available to your committee.

Fiats

A record of all fiats should be entered in the procedure book and a fee of $1.00 for the Clerk for this work is recommended.

Garnishment

Where the money sought to be attached is paid by way of wages or in a periodic payment under a contract unless the summons is served at the precise fraction of the minute between the sum falling due and the payment over of the same the attachment is liable to be defeated. It is suggested that, subject to all proper deductions, a garnishment should continue to operate in respect to any contract then in existence and that the garnishee should from time to time make payment into court of the monies which subsequently fall due until the whole sum has been paid.

The expression "probable costs" is too vague and a sliding scale of definite sums, having regard to the amount involved, should be provided in the Rules themselves.

Add to rule 661 (3) "or for groceries or food."

As an alternative to, or perhaps in addition to, the foregoing suggestion respecting garnishment, it is submitted that the rules relating to the appointment of receivers be extended as follows:

(a) To allow the appointment of receivers before judgment.

(b) The appointment to be on summons supported by an affidavit (as in the case of garnishment), and that the Sheriff or the Clerk of the Court be automatically appointed receiver.

(c) The receivership to include or cover wages and salaries above the exemptions as fixed by the Rules relating to garnishee.

In order to protect defendants it may be wise to include a provision similar to the undertaking to answer in damages in the case of interim injunctions, in the event that the defendant suffers loss through the improper appointment of a receiver.

Solicitor and Client Costs

The ruling that in contentious matters the solicitor is limited to the items in the tariff has not proven satisfactory. In practice it has been found that many solicitors charge a solicitor and client fee based on the amount realized in addition to the taxable schedule items. If kept within reasonable limits this is a most satisfactory method of dealing with this vexing problem. The lay litigant understands such an arrangement and the solicitor is adequately remunerated. An arrangement for solicitor and client fees in contentious matters in addition to the taxable items, based on the percentages set out in Rule 27 would be eminently fair and should be legalized.

Appeals to the Privy Council

The special rules for appeals to the Privy Council now hidden in 2 Alberta Law Reports, page 571, should be bound up with the new rules.

Party and Party Costs

The necessity for obtaining a judge's order under Rule 729 for the charges of accountants, engineers or other experts for investigations and inquiries has not in practise worked out very well. In the first place there is no uniformity among the judges as to when such an allowance will be made. It is suggested that the clerk of the court on taxation be given the power to permit payment to be made of such charges as he thinks are reasonable having regard to the nature of the case and the difficulties involved in it without the necessity of any application to a judge. This will result in a more uniform allowance.

There are some items not contained in Schedule "C" in respect to which allowance should be made:

Under the first heading for commencement of proceedings this should include commencement of proceedings by notice of motion where such proceedings may be commenced in that way. A fee should be allowed for attending on taxation of costs which it is suggested should be at the rate of $2, $3, $4, $5 and $6 per hour under the respective columns in the Schedule.

A fee for fixing date of trial should be permitted.

Fee for demand for particulars.

The foregoing are simply some of the things which occurred to this committee, and we think that in a great many cases work is done either before the Clerk of the Court or on the direction of a Judge for which no

tariff item is to be found. It is therefore suggested that a clause reading as follows should be added to the Rules respecting costs:

> "Whenever any work has been performed by a barrister or solicitor, whether before the Clerk of the Court or a Judge, or on the direction of a Judge, for which there is no item in Schedule "C", the Clerk may allow a suitable fee for the work so performed."

This would permit the taxation of a fee, i.e., to pay for written arguments when required or for the settlement of the contents of an appeal book where an application to the Clerk for this purpose has to be launched.

Schedule "C" at the present time has fifteen percent added to it and when the Schedule is reprinted this increase should be incorporated in the Schedule. During the last war the increase in the Schedule was thirty percent and although general living costs have been steadily increasing the Schedule has not similarly increased. It is suggested that at the present time an additional fifteen percent should be added to the tariff to carry out the precedent of the last war.

We have had a considerable number of complaints with regard to the allowance made on references and the taking of accounts before the Clerk and it is suggested that the fee for this should be $2.00, $4.00, $6.00, $8.00 and $10.00 per hour depending on the column under which such reference or accounting is taxed. In a great many instances the reference or accounting is of the utmost importance and the fee now allowed is obviously not sufficient and should be on a sliding scale.

In any event the fee on preparation for trial should be increased.

Conduct Money

Provision should be made for allowance in the conduct money for bus fare instead of train fare where a bus is available. It is suggested that where a judgment debtor is being examined he should attend at his own expense without being paid any conduct money owing to the fact that he already owes the judgment creditor a considerable sum of money.

Affidavit of Disbursements

Under Rule 771 it is necessary that the litigant swear that the disbursements sought to be taxed have actually been paid out. This is too stringent a limitation. A litigant may have been able to persuade his witnesses to give evidence without payment owing to the litigant's poverty, but this should not prohibit the litigant from collecting the money from his

opponent and paying such witnesses. It is therefore suggested that the Rules should provide that the litigant is entitled not only to the disbursements made but to such disbursements as the litigant is obligated to pay.

Extra Judicial Remedies

The fees allowed by the tariff for this work are not sufficiently high and no solicitor can undertake this work at these figures.

Default Judgments

There seems to be no uniformity in practice where a defendant in a damage or other action has been noted in default. In the first place, it should be definitely determined whether or not notice should be given to the defendant of the assessment of damages or of applications for any other remedies. In the next place, is it necessary to take out directions so that the matter may be entered for a hearing? Some judges insist that such directions be taken out. It is suggested that unless a demand for notice is filed by the defendant showing that he is interested in the proceedings that all further matters proceed *ex parte*.

There should be provision permitting the noting in default of a plaintiff where the defendant has counterclaimed and no defence is filed.

Services of Documents

Service is now permitted by registered mail. Some latitude should be given to the Clerk where the signature on the A.R. card is not identical with the name of the defendant. Sometimes different initials are used but it is obvious that the right person has been served. In such cases the Clerk should be entitled on proper proof being made to him to permit the filing of the judgment. There is also the very difficult case that arises frequently where some one else in the house signs for the defendant. It is suggested that if the document is served at the place of residence that this should be sufficient.

Vacation

There is considerable complaint by the members of the profession that contested motions can not be heard in vacation and it is urged that the Rule in this regard be changed. As the matter now stands some judges will hear contested motions and others refuse to hear them at all. In most instances matters of great importance arise in vacation just as they do at other times and the Rule could conveniently be changed.

Miscellaneous Suggestions

Rule 20. In this Rule the authorising of certain persons to defend an action is not sufficient should they fail to do so. The Rule should provide that these persons so named should be ordered to file a defence after they have been given due notice of the application.

Rule 74. Your committee suggests some consideration be given to this Rule. It is not feasible to endeavour to hide from the judge the fact that the payment has been made into court and it is questioned by your committee whether or not payment in with a denial of liability should have any effect on the costs. Some members of the committee think that such payment in should be abolished because the saving in costs where it is necessary to go ahead and establish liability is of no moment.

Service of Appointments. The Rules respecting service on the solicitor in cases where twenty days' notice of an examination for discovery is permitted and in aid of execution call for the service of the original appointment. It is submitted that this could be dispensed with and service of copies permitted in both instances.

Rule 270. The correction of clerical errors should be permitted to be be made by the Clerk of the Court in all judgments signed on default or with respect to *ex parte* orders.

Rule 378 is not satisfactory in its present form and should be replaced by Ontario Rule 275.

Rule 424. Word "property" should be changed to "properly."

Rule 462 and 463 should be widened so as to include "conveyance or other disposition of property, real or personal."

Rule 587 should include "order" as well as "judgment."

Rules 676 to 679. The procedure respecting payment of money in and out of court provided by these Rules has become obsolete and is not followed in practice.

Solicitor's Tariff Under Probate Rules

The profession here seems generally of the opinion that the amounts now provided are inadequate. This inadequacy has been aggravated by reason of succession duties both in the Province and in the Dominion. It is submitted that either the lump sums should be increased or that separate items should be provided for the additional steps necessary by reason of the succession duty affidavits.

Rule 812. Eliminate the words "or against" in this Rule.

Rule 810. It is submitted that solicitors' fees permitted to be taxed under this Rule are utterly inadequate.

It is suggested that the reason originally for restricting fees under this Rule was to discourage the bringing of small debt matters, more particularly collection claims, into the District Court when there was a Magistrate's Small Debt Court competent to deal with the same. In some districts, however, notably Calgary, the Magistrate's Court has been discontinued leaving claimants no choice in the matter.

It is submitted that proceedings brought under the Small Debt Rules in District Court require usually the same technical skill, and, apart from production of documents, and examinations for discovery, the same amount of time and preparation as larger matters in the same Court. Trials may be quite as long, and points of law just as difficult. It seems manifestly unfair, therefore, that a litigant who incurs solicitor and client costs ranging anywhere up to from $35.00 to $50.00 should be permitted to recover a maximum of only $10.00 for solicitors' fees from the unsuccessful party to the action.

The following revised schedule of solicitors' fees is submitted, as being rather more adequate:

1. In Undefended Actions:
   (a) Where the amount claimed or recovered does not exceed $25.00 ..... 25%
   (b) On the excess over $25.00 up to $50.00 ..... 20%
   (c) On the excess over $50.00 up to $75.00 ..... 15%
   (d) On the excess over $75.00 ..... 10%
2. In Defended Actions:
   Double the above percentage amounts.
3. Costs subsequent to Judgment:
   In addition to disbursements now permitted to be taxed, a successful party should be allowed to tax solicitors' fees on issuing garnishee process and writs of execution on the scale set out in Column 1 of Schedule C; also flat charge of say $5.00 on every examination in aid of execution. The time for filing a dispute note should be shortened.

Poundage

Under Rules 716 and 717 it should be specifically provided that the Sheriff is not entitled to any poundage on monies not passing through his hands.

Needy Litigants Rules

Since these Rules have become a permanent feature of our practice, it is submitted that they should be incorporated into the Rules of Court.

Some members are of the opinion that it is unfair to expect members of needy litigants committees to devote the time required to hear applicants for needy litigants certificates, and then to attempt to obtain members of the profession, who are often reluctant to do so, to act for the needy litigants.

It is submitted that the Clerk of the Court, or some person in his office, ought to be appointed in place of the committee to hear applications for certificates, and that one of the solicitors of the Attorney General's Department, or a solicitor appointed by it, should be the conducting solicitor.

In order to avoid uncertainty as to the meaning of "indigent circumstances", it is suggested that a "needy litigant" be defined as a person who owns no property and whose income is less than $40.00 per month in the case of a single person and less than $75.00 per month in case of a married person.

Your committee has not dealt with such Rules as have been added as a matter of policy by the Provincial Government, such as the Rule elimination costs in foreclosure actions of a certain nature. These were not considered to come within the scope of our inquiry.

Dated at Calgary, Alberta, this 5th day of March, 1942.

S. J. Helman,
Chairman.

Frank E. Newson, B.A., LL.B., secretary to the Rules Revision Committee, has kindly supplied us with the following memorandum setting out some of the additional recommendations received by the Committee:

(1) That greater power be given to the Court to demand admissions.

(2) That no order of the Court be necessary for examinations for discovery, except as to employees of a Corporation.

(3) That interrogatories be substituted for discovery.

(4) That the rules as to substituted service be extended to provide means for more effective service by double registered mail.

(5) That the rule relating to medical examinations be expanded defining (a) what questions may be asked a party by the examiner, (b) whether the examiner is solely a court witness, (c) whether the other party's physician may be present at the examination, (d) whether examiner's report is open to inspection, (e) whether there may be a second inspection.

(6) That the position of an infant and next friend be clarified in respect to discovery.

(7) That the jurisdiction of small debt procedure be extended to $200.00.

(8) That an order for service *ex juris* must be obtained *before* the commencement of proceedings in which any such order is desired.

(9) That costs of discovery be awarded to the successful party unless otherwise ordered.

(10) That the rules relating to commission evidence be simplified and that they contain adequate provision for costs.

(11) That provision be made for signing of judgment on praecipe when only a demand of notice had been filed (Rule 161).

(12) That Rules 178, 179 and 180 be stricken out as these are never given effect to.

(13) That provision be made for examination under Rule 384 without an order.

(14) That provision be made for the computation of witness fees on a mileage basis where private automobile is used.

(15) That provision be made (a) that plaintiff cannot abandon action if the defendant objects and (b) that substantial damages be awarded to

defendant where action improperly brought. (These two recommendations seek to achieve the same purpose of avoiding frivolous and embarrassing actions.)

(16) That provision be made to provide means of attaching proceeds of auction sales other than by garnishee proceedings.

(17) That exemptions in case of garnishee proceedings be made on a percentage basis.

(18) That exemptions in garnishee proceedings to a married debtor be eliminated in cases where spouse is employed.

(19) That provision be made defining more clearly whether an order for directions is necessary in undefended divorce actions.

(20) That provision be made to make the period between the decree nisi and the decree absolute begin to run from entry of the decree and not from the date upon which it is granted by the court.

(21) That in nullity cases, except with respect to voidable marriage, the decree absolute should be granted in the first instance.

(22) That rules providing for service *ex juris* should apply to actions for divorce and actions for judicial separation and should apply to actions by husband as well as wife. (Rule 204 (i).)

(23) That (in divorce proceedings) a defendant who has not defended be granted the right to enter a decree already granted and to apply for and enter a decree absolute.

(24) That the rules relating to the use of affidavits in divorce proceedings be clarified.

(25) That provision be made for a simpler and cheaper method of obtaining possession in the case of small properties of low rental value.

(26) That provision be made exempting a foreign executor from the necessity of filing a bond.

This article came to us in the form of letters written in reply to an inquiry sent out by the Rules Revision Committee. The letters have simply been run into each other in the form of an article. Some time ago Mr. Bentley withdrew this material from us on the ground that the quotations used by him had previously appeared in an article written by William S. Dutton and published in the American Magazine in 1929. Neither Mr. Bentley nor the Quarterly believed that reproduction would constitute an infringement of copyright, nor that the Crowell-Collier Publishing Company would assert its rights against the Quarterly. Nevertheless we wrote for advance permission. The Crowell-Collier Publishing Company generously granted us that permission, and at our request endeavored to locate the article for us in order that any of our readers who have access to back numbers of the American Magazine might read Mr. Dutton's article in full. This research failed to yield the desired result. This issue of the Quarterly has now been set up for several weeks and the University press is short of metal. We cannot ask it to hold the type longer while we check with Mr. Bentley, and this article is suited to this issue and not suited to our next issue. We herewith publish it. We will procure the correct citation later, and we wish to thank the Crowell-Collier Publishing Company for its kind co-operation. If Mr. Dutton happens to have published this particular article elsewhere we offer our most abject apologies and will make suitable amends later.

M. M. M.

DIVORCE PRACTICE IN PRINCE EDWARD ISLAND

By W. E. Bentley, K.C.,
of Prince Edward Island and Nova Scotia Bar

Prince Edward Island occupies a unique position with respect to divorce. A Court of Divorce was established in 1835. In establishing the Court the legislature declared, "it is necessary, in order to the keeping up of a decent and regular society, that matrimonial union be protected, and that a Court be constituted for cases of Divorce and Alimony." The Court was accordingly constituted. It consisted of "the Lieutenant Governor, or other Administrator of the Government, and His Majesty's Council". Causes of divorce were set out. Power was given the Lieutenant Governor to depute, constitute and appoint the Chief Justice of the Supreme Court to preside in the Court in the place of the Lieutenant Governor.

When divorce was allocated as a subject of federal legislation under the B.N.A. Act, 1867, this Act was still in force. It has never been repealed.

The Chief Justice was never deputed to act in the place of the Lieutenant Governor, and His Majesty's representative and His Majesty's Council still have the power as originally granted.

The last recorded case where the Court of Divorce acted was in 1865. In order no doubt to keep up a decent and regular society and to protect the matrimonial union the Court decreed that a husband should pay alimony to his wife. The husband seemed to have had other views. He refused to pay, was committed to jail by the Court of Divorce, tried to obtain a discharge by Habeas Corpus, and when this failed decided to spend the rest of his days in jail rather than comply with the Court's decree. His own decision remained unreversed and as he died in jail his decision must be taken to be a *res adjudicata.*

The case is *Capell v. Capell* and is found in Peters' (P.E.I.) Reports published in 1872. The Court held that where a statute creates a tribunal to put in force laws of the Mother Country, which were formerly dormant for want of a Court to administer them, the new tribunal must follow the principle, and as far as possible the forms of procedure usual in Courts having cognizance of such matters in England. But since the most effective mode of enforcing a decree used in England (viz., excommunication) could not be presumed to be given to the Governor in Council it was deemed reasonable that the Court could adopt one more fitted to the circumstances of this country. However, the judge did not pronounce a decided opinion on this point and the refusal of the Court to discharge the defendant was on the ground that a judge in chambers had no power to do so where the complaint was merely that the mode adopted to enforce obedience to the legal decree of a Court having power to adjudicate on the subject matter was irregular. The Court advised the defendant that he must resort to his action at law for redress but it would appear that by that time the defendant was no longer interested.

Whether this power of life and death over the parties to the matrimonial union was regarded as too arbitrary to be exercised or whether the remedy was considered worse than the disease, the fact remains that, notwithstanding various applications made for relief in cases clearly within its jurisdiction, the Court has failed to act. No rules have been adopted, no divorce has been granted nor marriage annulled, not even separation from bed and board nor alimony, during the past seventy-five years.

The Island Act of 1835 was copied from an Act passed in New Brunswick in 1791 (31 Geo. III, Cap. 5). Both Acts were in force at Confederation, but while in New Brunswick it was found advisable (in 1860) to amend the Act by changing the constitution of the Court from the Governor-in-Council to a Court called "The Court of Divorce and Matrimonial Causes" of which the Chief Justice was the judge, in the Island no such change was thought necessary. The Island Court thus remained a political Court, with the result that while in New Brunswick divorces are granted to the number of thirty or forty a year (in 1937 there were 53), in the Island no divorce or annulment of marriage has been granted by its Court for over three-quarters of a century.

The complete success of the Island Act in accomplishing its purpose of keeping up a decent and regular society and protecting the matrimonial union would thus appear. That Prince Edward Islanders are a superior race who are not subject to ordinary failings nor in need of a divorce at all, has been shown from published statements made some years ago by its Chief Justice and its then Lieutenant-Governor.

The former said:

"Divorce is looked upon as an admission of failure here. It is a mark against a man's record, a thing he must explain. The divorced man has failed in his duty as a home-maker, a husband, and a father, and few duties in life are higher than these. .

"The fact that a man is divorced is a handicap to him if he seeks a responsible position, and justly so. An applicant for a post of responsibility must stand upon his past record. If that record is marred by a failure in three of the most important duties he has undertaken, it is not unreasonable to suppose that he will fail in other duties. At least, the burden of proof to the contrary ought to be upon him. In business and in other pursuits men don't overcome obstacles by running away from them.

"Then why ought we to foster a different standard for marital difficulties, which frequently are of the most trivial and childish sort? It is ridiculous and silly for a man who has mastered oceans and deserts and conquered continents, to come meekly into a court-room, hat in hand, to plead that he can't get along with his wife.

"Public opinion on Prince Edward Island demands that a man give the same attention and effort to marriage that he gives daily to his business. Consequently divorce does not exist on the Island."

The Lieutenant-Governor at that time said with regard to divorce:

"When a community is overwhelmingly against a thing, you simply have none of it. We have a law, passed in 1835, which empowers the Governor and Executive Council to establish a divorce court, but no Governor has ever bothered to form something for which there is no public demand.

"I know of no place that has a higher standard of morality, and of no people who take greater pride in their homes. The people derive from God-fearing, wholesome stock. They are industrious, and the wealth is generally distributed and not concentrated in a few hands. We have no idlers, and no leisure class. These facts explain not only the absence of divorce, but also the absence of crime."

With testimonials from such high authorities, who would be so rash as to suggest that the Divorce Act of Prince Edward Island, under its administration by the Island Government, has failed in its purpose?

The pity of it is that in such a paradise of connubial bliss there are persons who have had to invoke special federal legislation to adjust their marital affairs and to obtain decrees even from the divorce mill at Reno.

In 1930, when jurisdiction over divorce was extended to the Supreme Court of Ontario, an effort was made to have relief granted the Island also. Nothing was done, and the Island still remains a divorceless province.

The fans of political courts and of the administration of law by government bureaus should be able to chalk up in this instance, "No runs, no hits, no errors".

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JAN 21 1965